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FILED
MAR 1 1962
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

October Term 1961

NO. 761

LEE MODE ..... *Petitioner*

Vs.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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The petitioner, Lee Mode, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas affirming the conviction of petitioner of murder in the second degree.

OPINION BELOW

The opinion of the Supreme Court of the State of Arkansas in the first trial on this matter is reported in 231 Ark. 477, and the opinion of the Supreme Court of Arkansas in the second trial in this case and the order denying the rehearing thereon has not yet been reported. (Appendix, p. 13)

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered October 31, 1961 (Appendix, p. 13). The petition for rehearing was filed November 14, 1961, and was denied by the Supreme Court of Arkansas on the 4th day of December, 1961. The jurisdiction in this Court is invoked under 28 U. S. C., Section 1257 (3).

QUESTIONS PRESENTED

1. Whether there was a denial of due process of law under the Fourteenth Amendment to the United States Constitution raised by the refusal of the Supreme Court of the State of Arkansas upon appeal to consider the sufficiency of the evidence for the conviction at the second trial of this cause under the rule of the "Law of the Case".

2. Whether there was a denial of due process of law under the Fourteenth Amendment of the United States Constitution by the refusal of the Supreme Court of the State of Arkansas to consider on the second appeal of this case assignments of error which were also raised in the appeal of the first trial, when those assignments were not considered, discussed or decided by the Supreme Court of the State of Arkansas on the first appeal.

STATEMENT

The federal question was raised by the petitioner for the first time before the Supreme Court of the State of Arkansas on a petition for rehearing following the appellate court's decision in the second appeal. It is at this stage of the case petitioner claims his rights were violated.

The petitioner was tried for murder in the first degree and was convicted in the Circuit Court of Conway County, Arkansas, for murder in the second degree. After a trial by jury on March 26, 1959, the petitioner took an appeal to the Supreme Court of Arkansas pursuant to Ark. Stats. Section 43-2708.[1]

In the first appeal to the Supreme Court of Arkansas, the petitioner urged and raised 64 grounds of error on the part of the trial court.

The petitioner in his brief to the Supreme Court of Arkansas on the first case argued only eight grounds to the appellate court, although 64 grounds for error were raised.

The Supreme court of Arkansas reversed the first conviction and remanded the case to the Circuit Court of Conway County, Arkansas, for a new trial. The majority of the Supreme Court of Arkansas in reversing and remanding the first conviction discussed one of the points argued

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[1]Ark. Stats. Section 43-2708 — Application to circuit court for appeal in certain cases. — When any person shall be convicted in any of the circuit courts of this State, for any offense other than a capital offense, or in any case in which a sentence has heretofore been imposed and execution suspended the circuit court in which such conviction is had, may grant the defendant an appeal to the Supreme Court.

by the petitioner which was the sufficiency of the evidence. On this point the Supreme Court of Arkansas held that the evidence at the first trial was sufficient to sustain the verdict and conviction and then went on to discuss one instruction that was given to the jury by the trial court and reversed the case on that particular point. Insofar as the remaining 62 grounds of error were concerned, the court made the general statement that several other points were argued in the briefs, all of which were examined but no further error was found. The Court did not consider all points of error raised.

The petitioner was re-tried before a jury in the Circuit Court of Conway County, Arkansas, and on October 24, 1960, was again convicted of murder in the second degree. The petitioner appealed the conviction for a second time to the Supreme Court of Arkansas. On this second appeal, the petitioner urged 61 grounds for error. Six of these errors were argued to the appellate court in petitioner's brief.

On October 30, 1961, the Supreme Court of Arkansas affirmed the second conviction. On the second appeal, one of the petitioner's grounds for error was that the evidence presented at the second trial was insufficient to sustain a conviction for second degree murder. The Arkansas Supreme Court in its majority opinion held that with only a few exceptions the assignments and the motion for a new trial in the second appeal were like the assignments of error urged in the first appeal and "since the evidence offered and rulings made were practically the same in both trials" the rule of the "Law of the Case" precluded the petitioner from urging any point that was assigned as error on the first appeal.

The evidence at both trials of this case is undisputed to the matter that on the 13th day of October, 1958, the petitioner was attacked by one D. L. Russell, in broad daylight on a public sidewalk in the downtown section of the City of Conway, Faulkner County, Arkansas. At the time of the fight the petitioner, Lee Mode, was a man 64 years old and in poor health and that the deceased, D. L. Russell, was in his middle 30's and very strong. The deceased had threatened to kill petitioner several times in the recent past, boasting that he could kill Mode with his hands. During the fight between these two men, D. L. Russell had his arms around petitioner and was struck by shots from a pistol held by petitioner, from which D. L. Russell died.

The testimony is also consistent in both trials that there had been bad blood between the petitioner and the deceased for some months, and that the deceased had made threatening gestures and statements toward the petitioner's life and that the petitioner was aware of these gestures and threats.

There were many witnesses testifying at the first trial, but only one person besides the petitioner testified as an actual eye witness to the shooting and the events immediately preceding the shooting. The name of this witness was Calvin Tyler. Mr. Tyler's testimony has been reproduced in full as given on the first trial in the Appendix at pages 39-44, and Mr. Tyler's testimony at the second trial appears in the appendix at pages 45-62.

For a clearer understanding of the importance and difference of the testimony at the two trials, we have reproduced photographs of the scene of the tragedy which were introduced by stipulation of the parties in both cases and

which appear in the original transcript of the second trial as Exhibit No. 6 and Exhibit No. 8.

The first photograph reproduced was introduced as Exhibit No. 6 in the second trial and is a view taken from the spot in Exhibit No. 6 just on the west side of the mouth of Spencer Street where the barber pole appears and is looking in an easterly direction, showing the side of the Farmers Supply Store on the Spencer Street side, looking east down Vanronkle Street in the City of Conway, Arkansas, and appears in the back of this petition.

The second photograph, which we will continue to call Exhibit No. 8, will show the court the front of a building called the Farmers Supply Store on Vanronkle Street in the City of Conway, which shows the scene looking in a westerly direction. The first street appearing in Exhibit 8 as entering from the northerly direction into Vanronkle and between Farmers Supply Store building and the first building immediately west is the mouth of Spencer Street. The third building displayed in Exhibit 8, which would be the dark red brick, two-story building, is the First National Bank building and appears in the back of this petition.

On the first trial, Mr. Calvin Tyler testified he was angling across Vanronkle going in a northwesterly direction towards the front of the Farmers Supply Store and when he was about 70 feet away from the point where the shooting took place, which occurred approximately where the "No Parking" sign appears in both Exhibits 6 and 8, he saw the deceased coming in an easterly direction down the sidewalk, nearly in front of the double door that enters Farmers Supply Store, when he saw the petitioner step from the doorway toward the deceased. The two men grappled and clinched. A shot was fired, and the deceased fell.

at which point the witness' son turned him around and took him from the scene (Appendix p. 40).

At the second trial of this case, Calvin Tyler's testimony was substantially different. Mr. Tyler testified he observed the petitioner walking down the sidewalk right near the corner of the Farmers Supply Store, going in a southeasterly direction and observed the deceased coming from the west of the petitioner down the sidewalk, walking behind the petitioner but in the same direction. That from the time he first noticed the two men until the time the deceased lay on the sidewalk some ten or fifteen seconds elapsed. That at the time he saw the two men in the positions described, the petitioner whirled around, faced the deceased, the two men came together and clinched. Two shots were fired. The deceased fell to the sidewalk and the witness' son turned him around and took him away from the scene (Appendix, pp. 48-49.)

We have already pointed out that at the first trial of this case, besides the testimony of Mr. Calvin Tyler, the only testimony of an actual eye witness to these events was the petitioner himself. At the second trial a man named Thomas Stone testified who was not called to testify at the first trial. To understand Mr. Stone's testimony, we call your attention back to the photograph reproduced and designated as Exhibit 8 and the two-story dark red brick bank building, two doors west of the Farmers Supply Store.

Mr. Stone testified that on the morning of October 13, 1958, he went to the First National Bank building and made a deposit. After he had completed his business in the bank, he walked out to the corner of the bank building on Vanronkle Street. As he stood on the corner by the bank he saw the petitioner come out of the mouth of Spencer Street.

turn on the sidewalk in front of Farmers Supply Store to go east when he passed the deceased standing on the west side of the mouth of Spencer Street and Vanronkle and heard deceased call out to the petitioner, "Hey, there old man." That the deceased was also going in an easterly direction. That the petitioner turned around approximately at the point where the "No Parking" sign appears in Exhibit 8. That when the petitioner turned around, the deceased rushed up to him and the two men went into a clinch and after a scuffle, he heard two shots fired and saw the deceased fall to the sidewalk (Appendix, pp. 62-81)

The balance of the testimony at both trials covered previous fights and altercations between the petitioner and the deceased and explored the ill feeling and bad blood between the petitioner and the deceased

SPECIFICATIONS OF ERRORS TO BE URGED

The Supreme Court of the State of Arkansas erred

1. In refusing to re-examine the sufficiency of the evidence taken at the second trial of this case when there was a substantial and clear difference in the material evidence presented and the appellate court in doing so denied the petitioner due process of law as guaranteed under the Fourteenth Amendment to the Constitution of the United States.

2 In refusing to consider those assignments of error raised by the petitioner in the second appeal of this case on the ground that the rule of "Law of the Case" foreclosed the petitioner from raising these assignments of error a second time when 62 of those assignments of error were not discussed or decided by the appellate court on the first appeal and by doing so denied the petitioner due process of law as granted under the Fourteenth Amendment to the Constitution of the United States of America.

REASONS FOR GRANTING

1.

The federal question appears for the first time in the petition for rehearing filed with the Supreme Court of the State of Arkansas following that appellate court's decision in the second appeal. There are no prior decisions of the Arkansas Supreme Court in criminal cases from which the petitioner could reasonably have anticipated that the appellate court would refuse to consider a sufficiency of evidence since it was materially and substantially different from the testimony on the first trial of this case which is on appeal. The federal question was also argued by the petitioner in his brief filed in support of the petition for rehearing.

While the order of the Supreme Court of the State of Arkansas denying the petition for rehearing did not specifically note that the appellate court had considered the federal question raised, subsequently the petitioner obtained a certification from the Chief Justice of the Supreme Court of Arkansas that the federal question was considered by the full court in denying the petition for rehearing and it is our position that this question has been seasonably and explicitly raised and disposed of by the highest court in the State of Arkansas. (Appendix pp. 112-113)

The State of Arkansas through its legislature has provided for an appeal in criminal cases from the trial court to the Supreme Court in Ark. Stats., Section 43-2708 [2]

The petitioner could not expect the United States Supreme Court to lend its judicial power to a matter unless the

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[2](Ark. Stats., Sec. 43-2708 quoted on page 3 of this brief.)

defects complained of as constituting a denial of due process, when corrected would lead to a substantially different result than they achieved through the denial. With this in mind, we have tried to strip this case and the questions presented of all fat and arrive at the elementary facts.

The evidence in the second trial revolves around a span of time covering from ten to fifteen seconds where the petitioner, a half-blind, sick, old man of 64 years was suddenly accosted and attacked on a public street from the rear by a young, strong, healthy, robust adversary in his middle 30's, who had sworn to kill him and who after accosting the petitioner without notice from the rear rushes to the petitioner, threw one arm around the petitioner's neck and began to grapple with petitioner who had to hold on to a "No Parking" sign to keep from being thrown to the ground and in order to protect himself in the heat of the attack, the petitioner shot and killed the decedent.

There was no testimony in the record that the petitioner saw the deceased prior to the moment when the deceased called out "Hey, there old man", and the petitioner under these circumstances turned around to find a person of whom he was afraid. This evidence adduced in this trial could not possibly point to the conclusion that the petitioner was guilty of murder, that he was the aggressor or that he was seeking the decedent to take his life or was lying in wait as the evidence on the first trial has indicated.

It is clear from the testimony and the record that the deceased brought on the altercation, that he rushed up and attacked the petitioner and grappled with him. The Arkansas Supreme Court in *Biddle vs. State*, 131 Ark. 537, stated the law of self-defense that it has consistently followed and said:

"In a prosecution for homicide where the defendant fired the fatal shot under the belief that it was necessary in order to protect himself from current harm and he fired the shot for that purpose, he should be acquitted although the jury believed that the accused was mistaken in his conclusion as to the danger to himself."

The evidence that we are concentrating on points to the deceased as the aggressor who had threatened death to the petitioner. We submit that if the Supreme Court of the State of Arkansas had considered the evidence adduced in the second trial surrounding the fatal fight that it would have concluded the petitioner's action to have been involuntary manslaughter under Ark. Stats. Section 41-2209,[3] or justifiable homicide under Ark. Stats. Section 41-2231,[4] rather than murder in the second degree under Ark. Stats. Section 41-2206[5]

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[3]Ark. Stats., Section 41-2209. — Involuntary manslaughter defined. — If the killing be in the commission of an unlawful act, without malice, and without the means calculated to produce death, or in the prosecution of a lawful act, done without due caution and circumspection, it shall be manslaughter. Provided further that when the death of any person ensues within one (1) year as a proximate result of injury received by the driving of any vehicle in reckless, willful or wanton disregard of the safety of others, the person so operating such vehicle shall be deemed guilty of involuntary manslaughter.

[4]Ark. Stats. Section 41-2231. — Justifiable homicide defined. — Justifiable homicide is the killing of a human being in self-defense, or in defense of habitation, person or property against one who manifestly intends or endeavors by violence and surprise to commit a known felony.

[5]Ark. Stats. Section 41-2206 — Murder in second degree — All other murder shall be deemed murder in the second degree.

The evidence adduced, if examined by the appellate court, should have produced a ruling that the trial court erred in not directing a verdict for the petitioner on the ground that the killing was justifiably done in self-defense.

From a study of the prior decisions of the United States Supreme Court, there appear many decisions discussing the rule of "Law of the Case". However, we have been unable to discover a decision squarely in point with the questions raised in the petition, but this case does raise a problem of practice and procedure in appellate courts throughout the United States and must occur in criminal cases with some frequency. The legislature of the State of Arkansas partially recognized this problem in enacting the [illegible] of Ark. Stats. Section 43-2723.*

This statute makes it mandatory in convictions where a capital offense is involved that the appellate court review the entire record for prejudicial error before confirming conviction whether or not such error was argued by the defendant on the appeal.

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*Ark. Stats. Section 43-2723. Trial of capital cases. — In all cases appealed from the circuit courts of this State to the Supreme Court, or prosecuted in the Supreme Court upon writs of error, where the appellant has been convicted in the lower court of a capital offense, all errors of the lower court prejudicial to the rights of the appellant shall be heard and considered by the Supreme Court whether exceptions were saved in the lower court or not; and if the Supreme Court finds that prejudicial error was committed by the trial court in the trial of any case in which a conviction of a capital offense resulted, such cause shall be reversed and remanded for a new trial, or the judgment modified at the discretion of the court.

The prime reasons relied upon by this petitioner as grounds for the prayer for a writ of certiorari are:

1. The laws of Arkansas permitted and granted both appeals to the State Supreme Court and the Supreme Court is bound to treat and consider the appeals in such a manner that it does not deny the petitioner due process of law under the Fourteenth Amendment to the United States Constitution.

2. By foreclosing consideration of the errors urged on appeal and in foreclosing the consideration of the evidence relied upon for the conviction of the petitioner both under the rule of "Law of the Case" when most of the errors raised on the first appeal were not considered and the evidence of the second appeal was substantially and materially different than the evidence in the first appeal the Supreme Court of Arkansas in effect and in fact made the second appeal a restricted and useless procedure in violation of the historic sense of justice and fair play which is traditional in this nation. An appeal which is rendered thus inert is no appeal at all. It has the general effect of leading the horse to water and refusing to let him drink.

These questions of law presented in this petition should be made crystal clear for all appellants who follow whose lives and liberty hang in the balance. The Arkansas Supreme Court in shielding from its view the evidence in the second trial which is also the substance of any trial denied and avoided the responsibility of monitoring the actions of

the lower courts. This denial is repugnant to the American concept of justice.

Petitioner urges that the United States Supreme Court grant the writ of certiorari to afford the petitioner the opportunity to pursue correction of these errors.

Respectfully submitted,

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Office-Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term 1961

NO. 761

LEE MODE ..... *Petitioner*

Vs.

STATE OF ARKANSAS ..... *Respondent*

APPENDIX

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

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SUPREME COURT OF THE UNITED STATES

October Term 1961

No.

Lee May, Petitioner

vs.

State of Arkansas, Respondent

APPENDIX

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

IN THE SUPREME COURT OF ARKANSAS

LEE MODE — APPELLANT

Vs. No 4955

STATE OF ARKANSAS — APPELLEE

SAM ROBINSON, Associate Justice, appellant, Lee Mode, was charged with first degree murder. He appeals from a conviction of second degree murder.

One of the points argued by appellant is that the evidence is not sufficient to sustain the verdict. This point is not well taken. There was bad blood between Mode and the deceased, Russell. This grew out of Mode's alleged attentions to Mrs. Russell. It appears that on anotner occasion Russell had taken a pistol away from Mode. The State introduced direct and circumstantial evidence to the effect that Mode stepped from a doorway and shot Russell down. On the other hand, the defense introduced evidence to the effect that Russell made an attack on Mode and in the ensuing struggle Russell was shot, that Mode was acting in self-defense. Mode was carrying a pistol and from the evidence it appears that he was carrying it for Russell. Russell was unarmed. The evidence is convincing that at the time of the killing Russell was returning from the bank where he had made a deposit for Charlie Simon. There is nothing to indicate that he anticipated seeing Mode, but the very fact that Mode was carrying a pistol indicates that he did anticipate seeing Russell. Mode contends that Russell was shot while the two were closely locked in a struggle, but there were no powder burns on Russell. He was shot in the left side of the head, and the doorway from which the State's witness, Calvin Tyler, testified that Mode stepped when Russell was shot, was to Russell's left.

evidence of Mode's infatuation for Mrs. Russell, the fact that undoubtedly there was bad blood between the two men, that Mode was carrying a pistol and had been for some time, that Russell took one away from him on another occasion, the direct evidence to the effect that Mode was in the doorway when Russell was passing along the street, that Mode stepped from the doorway and the shooting followed, Russell's being unarmed—all taken together is ample sufficient to sustain the verdict.

The defendant pleaded not guilty but during the trial the killing was not denied, defendant relying on the law of self-defense as justification for the slaying of Russell. Ark. Stat. §41-2231 provides: "Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person or property, against one who manifestly intends or endeavors by violence or surprise, to commit a known felony."

The jury did not accept Mode's version of the killing. Under the evidence in the case the jury could have convicted him of any degree of homicide. On the other hand, the jury could have acquitted him outright on their theory of self-defense. The court gave the jury 17 Instructions on the law of homicide and self-defense. Instruction No. 9 is very long, taking up about three pages of the record. It is as follows:

> "No. 9. The defendant, Lee Mode, contends that the killing of the deceased, D. L. Russell, was justifiable.
>
> "Justifiable homicide under the law is defined as follows: 'Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person or property, against one who manifestly

intends or endeavors by violence or surprise, to commit a known felony.'

"The defendant interposes a plea of self-defense as a justification for the homicide charged.

"The Court has defined justifiable homicide and will now define the law of self defense and when it may be exercised.

"A bare fear of those offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing; it must appear that the circumstances were sufficient to excite the fears of a reasonable person and that the party killing really acted under their influence, and not in a spirit of revenge.

"In ordinary cases of one person killing another in self defense, it must appear that the danger was so urgent and pressing, that in order to save his own life, or to prevent his receiving great bodily injury, the killing of the other was necessary, and it must appear also, that the person killed was the assailant, or, that the slayer had really and in good faith endeavored to decline any further contest before the mortal blow or injury was given.

"In ordinary cases of one person killing another in self defense, it must appear that the danger was so urgent and pressing, that in order to prevent his receiving great bodily harm, the killing of the other was necessary. But, to whom must it appear that the danger was urgent and pressing? It must so appear to the defendant. To be justified, however, in acting upon the facts and circumstances as they appeared to him, he must

honestly believe without fault or carelessness on his part, that the danger was so urgent and pressing that it was necessary to kill the deceased in order to prevent himself receiving some great bodily injury or harm.

"No one in resisting an assault made upon him in the course of a sudden brawl or quarrel, or upon a sudden encounter or in a combat, or from anger suddenly aroused at the time it is made or occurs, is justified in taking the life of an alleged assailant, unless he was so endangered by such assault as to make it necessary to kill his assailant to save his own life, or to prevent great bodily injury, and he employed all the means in his power, consistent with his safety, to avoid the danger and avert the necessity of the killing. The danger must apparently be imminent, irremedial and actual and he must exhaust all the means within his power consistent with his safety to protect himself and the killing must be necessary to avoid the danger. If however, the assault was so fierce as to make it apparently as dangerous for him to retreat as to stand, it is not his duty to retreat but he may stand his ground and if necessary to save his own life or prevent his receiving some great bodily injury, slay his assailant.

"The defendant, Lee Mode, interposes a plea of self defense. That the killing of D. L. Russell under the circumstances constituted justifiable homicide. The burden of proof is upon the defendant, Mode, to prove such defense by a preponderance of the evidence.

"If the jury finds from a preponderance of the evidence that at the time and place of the alleged difficulty resulting in the death of D. L. Russell, the de-

ceased, without legal justification, made an assault upon the person of the defendant, Lee Mode, under such circumstances indicating an intention upon the part of the deceased to inflict upon the person of defendant, Mode, some great bodily injury or death, and that the circumstances of such alleged assault, if any, were such as to excite the fears of a reasonably prudent person, and that the defendant, without fault or carelessness upon his part, in reaching a conclusion that danger was not only impending, but so pressing and urgent as to render the killing of the deceased necessary, and having exhausted all the means within his power consistent with his safety, and without the use of more force than was necessary, under the attending circumstances, as viewed by defendant, honestly and in good faith and not in a spirit of malice or revenge, and in his own necessary self defense, shot and killed the deceased, D. L. Russell, then, if the jury so finds, defendant Mode should be acquitted."

The defendant objected generally and specifically.

By Instruction No. 9 the jury were told that the burden was on the defendant to prove justifiable homicide by a preponderance of the evidence. Not only did the Instruction tell the jury that the burden was on the defendant to prove justifiable homicide by a preponderance of the evidence, but the instruction went further and appears to tell the jury that the burden is on the defendant (1) to prove by a preponderance of the evidence that Russell, the deceased, without legal justification, made an assault upon Mode; (2) to prove by a preponderance of the evidence that the circumstances of such alleged assault, if any, were such as to excite the fears of a reasonably prudent person,

(3) to prove by a preponderance of the evidence that the defendant was without fault or carelessness on his part in reaching a conclusion that danger was not only impending but so pressing and urgent as to render the killing of the deceased necessary; (4) to prove by a preponderance of the evidence that defendant had exhausted all the means within his power consistent with his safety; (5) to prove by a preponderance of the evidence that the defendant did not show more force than was necessary under the attending circumstances as viewed by the defendant; (6) to prove by a preponderance of the evidence that he, the defendant, acted honestly and in good faith and not in a spirit of malice or revenge; (7) to prove by a preponderance of the evidence that he acted in his own necessary self-defense.

It was error to instruct the jury that to justify the killing the burden was on defendant to prove self-defense or any element of self-defense by a preponderance of the evidence. Ark. Stat. §41-2246 provides: "The killing being proved, the burden of proving circumstances of mitigation, that justify or excuse the homicide, shall devolve on the accused, unless by the proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide." Instruction No. 4 given by the court was in the words of the Statute.

But the burden is not on the accused to prove justification by a preponderance of the evidence. It is sufficient if the evidence raises a reasonable doubt in the minds of the jurors as to whether the defendant was justified in committing the homicide. By Instruction No. 9 the jury were told in effect that notwithstanding they might have a reasonable doubt whether the defendant acted in necessary

self-defense, they could not return a verdict of not guilty unless the defendant had proved self-defense by a preponderance of the evidence. Otherwise, according to Instruction No. 9, the jury could not acquit, although they may have had a reasonable doubt of guilt, if the defendant had not proved by a preponderance of the evidence that he acted in self-defense.

In a long line of cases this Court has held that it is error to instruct the jury in homicide cases where self-defense is asserted as justification for the killing, that the burden is on the defendant to prove the theory of self-defense by a preponderance of the evidence. COGBURN v. STATE, 76 Ark. 110, 88 S. W. 822, is directly in point. That case has been cited many times and the rule therein announced has never been impaired. There the court correctly instructed the jury in the first instance in the words of the statute, Ark. Stat. §41-2231, above mentioned. But the prosecuting attorney incorrectly stated the law to the jury and then the court, over the defendant's objections, affirmed what the prosecuting attorney had said. In the COGBURN case this Court said:

> "In commenting on this instruction, the attorney for the State said:
>
> "'The Court tells you, under this instruction, which I read to you, that, the killing being proved, the burden of proving circumstances of mitigation and justification devolves on the accused. Under this law, after we introduced Jim West, we could have rested our case, and the burden was upon them to establish justification; and if they fail to satisfy you by a *preponderance of evidence* that the killing was justifiable, then you should convict him'. To which the defendant ob-

jected, and the court said: 'While it is true that if, upon the whole case, they had a reasonable doubt, they must acquit, yet as to matters of mitigation we would be required to furnish a *preponderance of the evidence*.' Now, the argument of the prosecuting attorney, as shown in the record, was not in accordance with the law; for, while it is true, as our statute declares, that when the killing is proved the burden of showing circumstances that mitigate or excuse the crime devolves upon the accused, where there is nothing in the evidence on the part of the State that tends to mitigate, excuse or justify the killing, still the burden on the whole case is on the State; and when evidence is introduced, either on the part of the State or the defendant, which tends to justify or excuse the act of the defendant, then if such evidence, in connection with the other evidence in the case, raises in the minds of the jury a reasonable doubt as to the guilt of the defendant; the jury must acquit. This is settled in this state by the statute which declares that 'when there is a reasonable doubt of the defendant's guilt upon the testimony in the whole case, he is entitled to an acquittal.' Kirby's Dig. §2387 (Ark. Stat. §43-2159).

"But if this statement of the prosecuting attorney were correct—that when the killing is proved the defendant must show by a preponderance of the evidence that the killing was justifiable—the jury would have to reject his defense whenever it was not supported by a preponderance of the evidence. This would limit the doctrine of a reasonable doubt to the fact of the killing, and when that was established beyond a reasonable doubt it would put the burden on the defendant of

establishing justification by a preponderance of the evidence, and if he failed to do so the jury would be required to convict him, even though the evidence adduced by him was sufficient to raise a reasonable doubt as to his guilt. But it cannot be said that the defendant must make out his defense by a preponderance of the evidence, and also that he is entitled to an acquittal if on the whole case the jury have a reasonable doubt of his guilt, for the two propositions are to some extent inconsistent. Testimony not sufficient to establish a fact by a preponderance of the testimony may be sufficient to raise a reasonable doubt as to the existence of the fact. To tell the jury that they must convict unless the fact of self-defense is established by a preponderance of the testimony, and also that they must acquit if they have a reasonable doubt as to whether the defendant acted in self-defense, is telling them to follow two rules which may lead to very different results.

"The statute, it will be noticed, says nothing about the preponderance of evidence. It says that, the killing being shown, the burden is on the defendant to show facts that justify or excuse his homicide. When however, he introduced his proof, the question, says Mr. Wharton, arises: 'Is it sufficient for him if he raises a reasonable doubt as to the defense he advances? Or must he establish this defense by a preponderance of proof in order to entitle him to an acquittal?' He answers *the question* by saying that when the defense traverses some essential ingredient of the indictment, such as malice or premeditation, it is sufficient if the proof raises a reasonable doubt. If the defendant undertakes to show that the act was done in necessary

self-defense, this tends to rebut the allegation of malice; and if the jury have a reasonable doubt on that point, they should acquit, for that is a reasonable doubt as to whether an essential charge in the indictment is true or not. It is otherwise when the defense does not traverse any essential averment of the indictment; for instance, when former conviction or acquittal of the same offense is set up. Wharton's Crim. Neg. §§331-334." (Emphasis ours)

"In TIGNOR v. STATE, 76 Ark. 589, 89 S. W. 96, it is said: " . . . though the burden of proving acts of mitigation may devolve on the accused, it is sufficient for him to show facts which raise in the minds of the jury a reasonable doubt as to his guilt."

In PARSLEY v. STATE, 148 Ark. 518, 230 S. W. 587, the Court held that although only a general objection was made to a like instruction, no specific objection was required.

In LOVEJOY v. STATE, 62 Ark. 478, 36 S. W. 575, it was held that preponderance of the evidence and reasonable doubt are not synonymous. The Court said: " 'Preponderance' and 'reasonable doubt' are not synonymous terms. It is suficient if the proof in the whole case raises a reasonable doubt as to whether the defendant took the cattle with a felonious intent. The state would not be justified in a conviction upon a preponderance of the evidence. Yet this instruction tells the jury, that, if they believe from a preponderance of evidence that the defendant took the cattle under the honest belief that he was the owner, they should acquit. The converse would be, 'If you do not believe from a preponderance of the evidence' that defendant took the cattle under the honest belief that he was

the owner, etc., you should convict. The instruction makes the question of intent, which is the very essence of the crime charged, depend upon the preponderance of the evidence to establish it, whereas it must be established by the State beyond a reasonable doubt. It must not be forgotten that in criminal cases, under the plea of not guilty, every element in the crime is controverted, and the State must affirmatively prove guilt.

"It would,' says Mr. Bishop, 'be a wide departure from the humanity of the criminal law to compel a jury by a technical rule, to convict one of whole guilt, upon the whole evidence, they had a reasonable doubt. And it would reverse the presumption of innocence to hold a defendant guilty unless, taking the burden on himself, he could affirmatively prove himself innocent. All evidence should be viewed in its entirety, not in detached parts. The whole of an alleged crime must be proved, just as the whole of it must have been committed. In reason, therefore, this whole and indivisible thing the burden of proof, must be borne by the government throughout the trial.' 1 Bish. Cr. Pro., Sec. 1051."

Appellant argues several other points, all of which we have examined, but we find no error other than the giving of Instruction No. 9.

Reversed and remanded.

CARLETON HARRIS, Chief Justice, dissenting. I agree that Instruction No. 9 was erroneous; however, I do not consider that the objection made was sufficient to properly challenge the instruction. In no part of his objection did appellant specifically object to the use of the word "preponderance". His objection was " * * * that the Court refused to add the provision to said Instruction, that if the evidence adduced by the defendant created a reasonable doubt in the mind of the jurors, then the defendant would be entitled to a reasonable doubt and should be acquitted on the doctrine of reasonable doubt. The court then held that the general instructions on reasonable doubt "would not only reach self-defense and burden of proof, but also the evidence and all other issues in the case." No further objection was made to the instruction. In several cases before this Court, an instruction copying our statute (Ark. Stats., §41-2246) has been given. Such section reads as follows:

> "The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by proof on the part of the prosecution it is sufficiently manifest that the offense amounted only to manslaughter, or that the accused was justified or excused in committing the homicide."

In TIGNOR v. STATE, 76 Ark. 489, 89 S. W. 96, and HOGUE v. STATE, 194 Ark. 1089, 110 S. W. 2nd 11, we held that this instruction is proper, if accompanied by an instruction that on the whole case the guilt of the defendant must be proved beyond a reasonable doubt. Except for the use of the word "preponderance", Instruction No. 9

says no more than we have approved on numerous occasions. In the instant case, the court, in Instruction No. 4, quoted §41-2246, and then added the following:

> "Notwithstanding the provisions of the preceding section of law as to burden of proof, the burden of proof in the whole case is upon the State of Arkansas, to prove from the evidence beyond a reasonable doubt the guilt of defendant, as charged and of any degree of crime or homicide included in the information."

Likewise, in Instruction No. 8, the court concluded by instructing the jury that appellant should be acquitted "if you find the defendant not guilty of any degree of murder or homicide, or *if you have a reasonable doubt of his guilt of any degree of homicide*. * * * * *". It accordingly appears to me that the court, in giving these two instructions which properly stated the law as to reasonable doubt, adequately took care of any possible objectionable features in the instruction except for the word "preponderance" and the use of this word was not objected to by appellant. I therefore do not agree that this case should be reversed because of the giving of Instruction No. 9, and I respectfully dissent to the ruling of the majority.

PAUL WARD, Associate Justice, dissenting. Although I agree with the majority that portions of Instruction No. 9, as pointed out by the majority, were not proper, and although I further agree with the majority that appellant's objection was sufficiently specific to call the court's attention to the erroneous part of the instruction, still it is my opinion that under the state of the record in this case the judgment of the trial court should be affirmed.

ONE. Other instructions of the court contained what appellant asked for. Instruction No. 2 told the jury that the defendant is entitled to the benefit of a reasonable doubt. In Instruction No. 8 the court told the jury that if they had any reasonable doubt as to the guilt of the appellant of any degree of homicide or manslaughter they should acquit him. In the same instruction the court also told the jury that in determining the guilt or innocence of appellant they should consider all instructions given by the court.

We have uniformly held that instructions need not be duplicated.

TWO. Moreover, and most important in my judgment, it appears from the record that appellant waived any possible error that the court may have committed in the giving of the questioned instruction. When the court had finished giving Instruction No. 9, which consisted of some five or six separate paragraphs, appellant made the specific objection that the court refused to add that if the evidence adduced by the defendant created a reasonable doubt in the minds of the jurors then the defendant should be acquitted. Following this the court made this comment: "The court holds that the general instruction on reasonable doubt would not only reach self-defense and burden of proof but also the evidence and all other issues in this case." Apparently appellant was satisfied with the court's statement because no other instruction was asked for and no further objection was made. In my judgment the court's statement removed all possibility of error. We assume that the statement of the court was made in the presence of the jury and consequently amounted to a compliance with appellant's request. If it was not made in the presence of

the jury, then appellant could have requested that it be reduced to writing and presented to the jury, but no such request was made by appellant. This silence on the part of appellant amounted to trapping the trial court into error. We have repeatedly refused to allow this to be done.

The situation in this case can easily be distinguished from that in the case of COGBURN v. STATE, 76 Ark. 110, 88 S. W. 822, which is relied on so heavily by the majority. In the COGBURN case it appears that the reversible error consisted of the court allowing the Prosecuting Attorney to argue to the jury the preponderance rule even though the jury had been instructed to the contrary. If such argument was made by the Prosecuting Attorney in the case under consideration the defense attorneys had a ready and adequate remedy. They could have pointed out the other instructions of the court referred to above and they could have, in particular, referred to the explanation of the court copied above in which the court stated that the "reasonable doubt" rule applied to self-defense.

IN THE SUPREME COURT OF ARKANSAS

LEE MODE : APPELLANT

Vs. No. 5011

STATE OF ARKANSAS APPELLEE

HARRIS, C. J., and WARD and JOHNSON, JJ., dissent

ED F. McFADDIN, Associate Justice. From a conviction of second degree murder for the homicide of D. L. Russell, Lee Mode prosecutes the present appeal. The first appeal is *Mode v. State*, 231 Ark. 477, 330 S. W. 2d 88, wherein we recited the facts and held that the appellant had shown only one error in the trial, which error concerned an instruction. The cause was remanded and, on retrial, Mode was again convicted of second degree murder and now prosecutes the present appeal. The error in the instruction in the first trial did not occur in the second trial.

With only a few exceptions, to be subsequently noted, the assignments in the motion for a new trial in the present appeal are the same as the assignments in the motion for new trial in the first appeal *since the evidence offered and the rulings made were practically the same in both trials*. The rule of "law of the case" precludes the appellant from now urging any point that was assigned as error on the first appeal. RANKIN v. SCHOFIELD, 81 Ark. 440, 98 S. W. 674; St. L. I. M. & S. Ry. Co. v. HILL, 92 Ark. 484, 123 S. W. 760; St. L. I. M. & S. Ry. Co. v. DeLAMBERT, 120 Ark. 61, 178 S. W. 926; and FORD MOTOR COMPANY v. FISH, ... Ark. ..., 346 S. W. 2d 469. In BOWMAN v. STATE, 93 Ark. 168, 129 S. W. 80, this Court held that the rule of

"law of the case" was applicable to criminal cases as well as to civil cases, and such is also the rule in other jurisdictions. In 24 C. J. S. 690, "Criminal Law" §1840, under the topic, "Former Decisions As Law of Case." Cases from sixteen jurisdictions are cited to sustain this statement:

> "Generally, the determination of the appellate court as to all questions within the record which are or might have been raised and decided will be the law of that case in subsequent proceedings in the case."

The text also says:

> "Hence, a decision on a prior appeal in the same case as to the sufficiency of the evidence to authoritize a conviction . . . . is the law of the case on a subsequent appeal, where practically the same evidence is involved."

Our long established rule in felony appeals is that this Court will consider every assignment in the motion for new trial, regardless of whether the assignment be argued in the briefs. In MARTIN v. STATE, 206 Ark. 151, 174 S. W. 2d 242 we said:

> "For reversal he has brought forward in his motion for a new trial fourteen assignments of error. While appellant, in his brief, argues but one alleged error—that the evidence is not sufficient to support the verdict—it becomes our duty, since appellant is charged with a felony, to consider all other alleged errors contained

in the motion for a new trial, whether argued in appellant's brief or not. EVELAND v. STATE, use of Fossett, 189 Ark. 517, 74 S. W. 2d 221; VAN HOOK v. HELENA, 171 Ark. 1083, 282 S. W. 673; KNIGHTON v. STATE, 169 Ark. 293, 274 S. W. 10; and BABERS v. STATE, 168 Ark. 1055, 272 S. W. 659."

See also BOYD v. STATE, 215 Ark. 156, 219 S. W. 2d 623.

The application of the foregoing rules means that the appellant is now precluded from urging as error any assignment in the motion for new trial in the present appeal if that assignment was contained in the motion for new trial in the first appeal, and based on a record exception. This is the sound rule. It prevents an appellant from failing to argue a point on the first appeal in order to save it as a possible ground for reversal should he be convicted at a second trial, and thus obtain a successive number of trials, with each involving an identical ruling in a previous trial, which ruling was not argued on the previous appeal.

We have made a careful comparison of the assignments contained in the motion for new trial in the present appeal, as against those contained in the motion for new trial in the first appeal. Under the rule of "law of the case", we eliminate all such, and we proceed now to discuss the assignments concerning matters which were not foreclosed by the first appeal.

I.

TESTIMONY OF JERRY RUSSELL AT THE FORMER TRIAL

Jerry Russell testified in the first trial, and a transcript of his testimony was read at the present trial after the State had offered evidence that the witness could not be found. Appellant claims the Court committed error in allowing the transcript of testimony to be read to the jury. The efforts to locate the witness were shown in considerable detail. Subpoena was returned "non-est," the State Police had been unsuccessful in a search for the witness, and the grandparents of the witness testified that they did not know where he was. In the light of such showing, we find no error committed by the Trial Court in allowing the State to read to the jury the testimony of the witness given at the former trial. Section 28-713 Ark. Stats., is the applicable statute, and says, *inter alia, that such former testimony may be read* to the jury "when for any reason the former witness may not be available." There was such a showing in this case. The objections to the content of the testimony of the witness, Jerry Russell, are foreclosed by the rule of "law of the case," *supra*.

II.

RELATIONSHIP BETWEEN MR. MODE AND MRS. RUSSELL SUBSEQUENT TO THE HOMICIDE

The witness, Clara Eggleston, introduced pictures of Mrs. Mildred Russell (wife of the deceased) taken in Sallisaw, Oklahoma, in 1959 and 1960. The witness also testified that in June, July, and August, 1959, Mrs. Russell was then going under the name of Mildred Mode and was living with Lee Mode in a trailer court in Sallisaw, Oklahoma. Two other witnesses also testified as to pictures of Mrs. Mildred Russell taken about the same time in Sallisaw, Oklahoma. In admitting such testimony of these witnesses, the Trial Court ruled:

> "The Court will repeat at this time that this testimony tending to show this association or togetherness of the two parties, that is Mildred Russell and Lee Mode, if it does show, is admitted for the purpose of shedding light, if it does shed light upon any motive for killing involved in the trial of this case and to the relationship of the parties if it does shed such light, prior to the difficulty or trouble resulting in the death of D. L. Russell, and it is not to be considered for any other purpose."

We find no error in the Court's ruling. In Hornsby v. State, 163 Ark. 396, 260 S. W. 41, Hornsby was accused of killing Mr. Fells because of Hornsby's love and infatuation for Mrs. Fells. In that case the Trial Court allowed letters to be introduced that Hornsby had written Mrs. Fells after

they were put in jail. This court affirmed the ruling of the Trial Court, saying:

"The court did not err in permitting the State to introduce the letters of the appellant to Mrs. Fells after they were put in jail. These letters were identified as the letters of the appellant, and he does not dispute that they were his letters. They were filled with protestations of love for Mrs. Fells, and tended to corroborate her testimony to the effect that appellant was in love with her at the time he killed Fells, and tended to prove a motive on the part of the appellant for killing Fells. STOKES v. STATE, 71 Ark. 112-117. 'The State may show the existence of a motive for taking the life of the deceased in determining guilt or innocence of the accused.' AVERY v. STATE, 149 Ark. 642, and cases there cited. See also SNEED v. STATE, 159 Ark. 65-72."

So, in the case at bar, the evidence that Mrs. Russell and Mr. Mode were living together in a trailer court in Sallisaw, Oklahoma, during the summer of 1959 would be admissible on the question of motive, if any, as to the cause of the homicide; and also the conduct of Mode and Mrs. Russell subsequent to the homicide could be shown as shedding light on the relationship toward each other prior to the homicide.

III.

EVIDENCE OF GOOD CHARACTER OF DECEASED

This is the point that has given us the most serious concern. Assignment No. 43 in the motion for new trial reads:

"The court erred in admitting the testimony of Ted L. Welborn, over the objection and exceptions of the defendant, to the effect that the reputation of D. L. Russell was good; that he was a peaceable law-abiding citizen; to which ruling of the court the defendant at the time objected and duly saved his exceptions.".

This assignment cannot be disposed of by the rule of "law of the case" because, in the first trial, there was no objection to testimony of the good character of the deceased. But in the trial from whence comes this appeal, the following occurred when the witness Welborn was testifying for the State on rebuttal:

"Q. Did you know D. L. Russell prior to his death?

A. Yes, sir.

Q. Was he a resident of Faulkner County?

A. He was.

Q. Did you know his reputation among those who knew him for being a peaceable, law abiding citizen?

MR HOLT: We object to that, as being improper.

BY THE COURT: Your objection will be overruled.

MR. HOLT: Save our exceptions.

A. I do.

Q. Did you know him on October 13, 1958?

A. I did.

Q. Do you know what his reputation was on October 13, 1958 for being a peaceable, law-abiding citizen?

A. I think so, yes, sir.

Q. What was that reputation—good or bad?

A. Well—that puts me on a spot. There had been a disturbance that I had been called to.

Q. We are talking about his reputation, Mr. Welborn.

A. His reputation was good.

Q. Those times that you were called, you testified about those yesterday?

A. Yes, sir.

Q. Once at the instance of "Mut" Jones?

A. That is right.

Q. And the instance of Lee Mode?

A. Yes, sir.

Q. And once at the instance of Gerald Mode?

A. That is right."

Appellant insists that the general reputation of D. L. Russell for being a peaceable and law-abiding citizen had never been attacked by evidence offered by the defense, and for that reason it was fatal error for the Court to allow the State on rebuttal to show Russell's reputation as being a peaceable and law-abiding citizen. We have a number of cases which deal with various phases of this matter, but in each there was a state of facts different from those present-

ed in the case at bar. Some such cases are: PALMORE v. STATE, 29 Ark. 248; BLOOMER v. STATE, 75 Ark. 297, 87 S. W. 438; BRYANT v. STATE, 88 Ark. 250, 129 S. W. 295; SHEFFIELD v. STATE, 120 Ark. 458, 179 S. W. 650; KELLEY v. STATE, 146 Ark. 509, 226 S. W. 137; CARR v. STATE, 147 Ark. 524, 227 S. W. 776; FISHER v. STATE, 149 Ark. 48, 231 S. W. 181; JETT v. STATE, 151 Ark. 439, 236 S. W. 621; BOGUE v. STATE, 152 Ark. 378, 238 S. W. 64; BRIDGES v. STATE, 169 Ark. 335, 275 S. W. 671; DAY v. STATE, 185 Ark. 719, 49 S. W. 2d 380; and BURTON v. STATE, 204 Ark. 548, 163 S. W. 2d 160.

From these cases, we recognize the pertinent rules in Arkansas in a homicide case (as is the one at bar) to be: (a) that in the case in chief the State may not show the general reputation of the deceased as a peaceable and law-abiding citizen; (b) that unless the defendant undertakes to show that the deceased was not a peaceable and law-abiding citizen, then the State may not, on rebuttal, offer evidence of such good reputation; and (c) that bad reputation may not be shown by testimony as to specific acts of violence or turbulence. These are the general rules, but in the case at bar the defendant, under his claim of self-defense, showed (as was his right) a vast number of specific acts of bad conduct on the part of the deceased. This testimony related to threats, shooting, carrying a gun, fighting, etc., concerning all of which Mode was aware personally or was so advised by others. We list the following specific instances wherein the defense elicited testimony about the conduct of the deceased:

(a) Witness Dave Ward testified that a year before the fatal shooting Russell told Ward that he (Russell) was carrying a gun for Mode and that he was going to kill

Mode; that Ward conveyed that threat to Mode; that Ward got Russell to put up his gun in July, and Russell said he could kill Mode without a gun; that hard feelings existed between Russell and Mode; that Ward saw a gun in the glove compartment of Russell's car two or three times; that Russell "jumped" John McCracken and got into a heated argument with Ward and Elbert Ryan, Shop Superintendent, in Ward's office in July.

(b) Roy Barton testified that Russell came to his garage one day looking for Mode; that Russell was "mad" and said that if he found Mode he would kill him.

(c) George W. Robinson testified that Russell asked him if he had a gun (which he didn't); that Russell cursed and said he was getting tired of Mode coming out to his house; that the next time or two Russell went to town he "picked up a gun" and said he was going up there and get some shells and kill Mr. Mode and J. D. (Mode) both, if necessary; that Robinson told Mr. Mode about the threats, and told Mode "to watch him—watch out for him."

(d) Virgil McCoy testified that Russell said he didn't want Mode out on the farm—that he was going to shoot him if he came back out there; and McCoy gave the information to Mode.

(e) Charles Hartsell testified that Russell came to Mode's house, cursed Mode, and told him to come out, and then stated that he would kill him if he did come out.

(f) Bruce Henderson testified that Russell tried to borrow a gun from him; that, later, Russell had a gun that was jammed and asked Henderson to show him how it would shoot; that he said he took the gun from Mode and wanted it with which to kill Mode.

(g) Leo Looper testified that Russell said he and Mode were having trouble, and Russell cursed him and said if he could find Mode he would kill him.

(h) Elmer Joe Swaffar testified that Russell attacked Mr. Mode—made a lunge at Mode and grabbed him around the neck (at the fatal encounter).

(i) Gerald Mode testified that Russell came to Mode's house and cursed him and threatened to kill him; that Russell told Gerald downtown that he would get his father, Lee Mode, sooner or later, and that Russell came to Mode's house one night and shot two or three times over the house.

We hold that when the defense offered all of the foregoing evidence, the defense thereby opened the door for the State to show on rebuttal the general reputation of the deceased Russell as a peaceable and law-abiding citizen. Such evidence certainly tended to rebut the defendant's evidence as to acts of bad conduct, turbulence and violence on the part of the deceased. Even though general reputation cannot be shown by acts of specific misconduct, yet when, under the claim of self-defense, there is offered—as here—such an abundance of testimony of specific acts of bad conduct as to present a picture of the deceased being a violent and turbulent man, then the defense has, in effect, attacked the good reputation of the deceased and has opened the door for the State to show on rebuttal the general reputation of the deceased as a peaceable and law-abiding citizen. In CARR v. STATE, 147 Ark. 524, 227 S. W. 776, the appellant attacked the reputation of the deceased for peace and quietude; the State introduced a witness to show that the reputation of the deceased was good. Appellant attempted on cross-examination of the witness to elicit his knowledge of acts of violence on the part of the

deceased indicating otherwise. The defense offered to show testimony of nine specific acts of violence, but this evidence was rejected. In holding that the Court was in error in refusing the proffered testimony, we said:

"We think the form of the question immaterial in the instant case, because the very nature of the specific acts of violence offered to be established by the witness were of such a notorious and public nature within themselves as would tend to establish general reputation. Especially is that true in view of the great number of violent acts offered to be proved, covering so short a period of time."

It is true that in two subsequent cases there were attempts by this Court to limit or distinguish the language in the Carr case. These cases are FISHER v. STATE, 149 Ark. 48, 231 S. W. 181, and BRIDGES v. STATE, 169 Ark. 335, 275 S. W. 671. In each of these cases the factual situations and the defenses were different from those in the Carr case and also in the case at bar. In BRIDGES v. STATE, supra, there was no plea of self-defense and no testimony of threats offered by the deceased against the appellant, and no evidence of specific acts of violence by the deceased. So the Bridges case is not in point. In FISHER v. STATE, supra, the defense offered evidence about the deceased seeking to borrow a pistol, and the State contended that such testimony allowed the State, on rebuttal, to show the good reputation of the deceased. But this Court said:

> "We do not think what the defendant proved concerning the deceased was equivalent to proving his general character as a violent, quarrelsome and fighting man. It is clear that the proof made in the Carr case by the defendant as to the character of the deceased was of

an entirely different nature from the proof made in the case at bar . . . The character of the deceased as being peaceful and quiet is presumed to be good until the contrary appears, and, the testimony of the defendant not being sufficient to show that the general reputation of the deceased in that respect was that of a quarrelsome and fighting man, the State was not entitled to introduce original evidence upon that subject."

The case of BRYANT v. STATE, 95 Ark. 239, 129 S. W. 1101, shows how slight need be the evidence offered by the defense in order for the State on rebuttal to show the general reputation of the deceased. In that case, Mr. Justice Battle, speaking for the Court, said:

"On cross-examination of Mrs. Minta Potter, the widow of the man killed, the witness testified that the deceased was quick to get mad and fight, and he was a brave man, and would fight at the drop of a hat. The State by many witnesses proved in rebuttal that the general reputation of the deceased for being a quiet peaceable citizen was good. The appellant contends that the court erred in admitting it. It was only admissible for the purpose of sustaining the reputation of the deceased after it had been attacked. In this case the evidence adduced by the defendant on cross-examination tended to prove that the deceased was aggressive, quick to take offense, and resent it with force unnecessarily. The evidence adduced by the State was admissible to remove such impression. Wharton on Homicide (3 Ed.) 208, and cases cited."

Our holding that the State opened the door to allow the questioned testimony on rebuttal, is in accord with the

holdings in other jurisdictions and also in accord with the text writers.[3]

The case of the STATE v. RUTLEDGE, 243 Iowa 179, 47 N. W. 2d 251, goes thoroughly into the matter. Testimony was admitted in rebuttal that deceased was a quiet and peaceable citizen, and the defense asserted that no attack had been made on deceased's character or reputation and that the admission of the evidence constituted error. The testimony complained of was to the effect that deceased had made various telephone calls to the accused in which he abused, cursed, and threatened to come to the hospital and beat him up; that he brandished a knife while talking to defendant's detective and told him to warn defendant that he was not a doctor but that he could operate; and that deceased was frequently intoxicated. In holding that the testimony concerning deceased's good character as a quiet and peaceable citizen was admissible in rebuttal, the Iowa Supreme Court said:

> "40 C. J. S. Homicide, §272e, pp. 1225, 1226, states although such evidence cannot be introduced by the prosecution in the first instance, where the accused, in a homicide case in which self-defense has been set up, has introduced evidence tending to show the turbulent, violent, and quarrelsome character of the deceased, the prosecution may in rebuttal introduce reputation or character evidence to the contrary. 26 Am. Jur. 397, Homicide, Section 349, states: "No general rule can be laid down for the determination of what will be held to constitute an attack by the defendant upon the character or reputation of the deceased, so as to open the door for rebuttal evidence; each case must be decided according to the circum-

stances thereof . . . Most authorities hold the attack on the character of the deceased need not be direct as to his character or reputation to render admissible in rebuttal evidence of his good character as to being a quiet and peaceable citizen. Whether the attack is made by evidence of general reputation or otherwise the State may meet it by evidence of such good character. We hold the evidence introduced by the defense in this case constituted an attack upon Hattman's character within the rule above mentioned."

Another case is SWEAZEY v. STATE, 210 Ind. 674, 5 N. E. 2d 511. The question presented was whether testimony as to the general reputation of the deceased for peace and quietude could be introduced. The Indiana Supreme Court said:

"We think the evidence competent and material. Appellant testified in his own behalf and claimed that the deceased made an attack upon him. That he was standing in the doorway with his gun standing beside him, and as soon as the deceased observed his presence he made the remark, 'There is the s of a b' and raised his gun and shot appellant. This is a direct attack upon the character of the deceased and put his reputation for peace and quietude in issue. While appellant's defense was not self defense, yet he charged the deceased as being the aggressor and making the assault upon him." The Indiana Court further quoted from FIELDS v. STATE (1892), 134 Ind. 46, 32 N. E. 780, as follows:

"'The defendant testified that the deceased assaulted him, and that he apprehended great injury to life or limb from the assault. On rebuttal the court permitted the State

to prove that the deceased was a peaceable, quiet man. This was not erroneous.

The question was before the New Mexico Supreme Court in *State v. Brock*, 56 N. M. 338, 244 P. 2d 131, wherein the specific acts testified to were as follows: Deceased came to defendant's house and asked to borrow money to help pay for a rifle, and was refused. Thereupon, deceased made the statement that if the defendant didn't get out of there he would throw him out or blow him out. The same threat was repeated on two subsequent occasions. Later, when the two were attempting to talk things over, deceased pulled a gun on defendant and defendant shot first and killed deceased. In holding that testimony concerning deceased's reputation for being a quiet and peaceable man was admissible on rebuttal, the New Mexico Court cited *inter alia*, *State v. Todd*, 28 N. M. 518, 214 P. 899; State vs. Rutledge 243 Iowa, 179, 47 N. W. 2d 251; and DeWoody v. State, 21 Ariz. 613, 193 P. 299; and quoted from the DeWoody opinion, as follows:

> "It is to be observed, however, that when the defense in a prosecution for homicide puts the character of the deceased as a quarrelsome, turbulent or violent and dangerous man in issue, the State may support it by proofs that the deceased was a peaceable, quiet and law-abiding man. Wharton on Homicide (3d Ed.) par. 269. Furthermore, the attack on the character of the deceased need not be direct as to his general reputation to render admissible evidence of his good character on the part of the State. It is immaterial in what manner the attack is made, whether by evidence of general reputation or by any other species of evidence. If the issue is raised by the defense at all, the State may

meet it by evidence of general reputation as to good character. Wharton on Homicide, 3d Ed., par. 270. PEOPLE v. GALLAGHER, 174 N. Y. 505, 66 N. E. 1113, affirming 75 App. Div. 39, 78 N. Y. S. 5. No general rule can be laid down for the determination of what will be held to constitute an attack by the defendant on the character of the deceased so as to "open the door" for rebuttal on behalf of the State, but each case must be decided according to its own circumstances or facts. 13 R. C. L., par. 219, p. 917. KELLY v. PEOPLE, supra, 229 Ill. 81, 82 N. E. 198, 12 L. R. A. N. S., 1169)."

CONCLUSION

We have carefully considered all the assignments and find no error.

Affirmed.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice. This case is before us for the second time. I was convinced that the judgment in the former appeal, Mode v. State, 231 Ark. 477, 330 S. W. 2d 88, should have been affirmed and so voted. In that case I found no reversible error nor did I find any erroneous extension by this Court of the basic rules of criminal procedure. I view these rules as sacred rights which belong to every accused whether that person be guilty or innocent and consider any court's extension of those rules beyond its province.

The majority's discussion of appellate procedure in felony cases gives me much concern. The majority has ap-

plied several rules of practice in a manner which seems inconsistent with the purpose of those rules.

I find no statutory equivalent in felony appeals of the mandate of Ark. Stats. §43-2723 in capital appeals. No doubt the purpose of the legislature in enacting §43-2723 was to make certain that no conviction of a capital offense will be allowed to stand unless the defendant received a trial which was consistent with the fundamental standards of due process and procedural fairness. The statute requires the court to review the entire record for prejudicial error before affirming a conviction. If such error does appear the conviction must be reversed, whether the error was argued by counsel or not.

The requirement in felony appeals to review all errors contained in the motion for new trial, whether or not argued in the appellant's brief is an extension in case law of the duty imposed by §43-2723. The same considerations underlying the statute are presented in felony appeals.

In both instances it is my view that the duty of the court to examine the record for error is at an end when reversible error is found. Of course, the court may wish to continue to examine other assignments after finding reversible error. RAND v. STATE, . . Ark. . . ., 341 S. W. 2d 9. If this is done and those assignments are discussed and actual findings are made, I agree that on these points there is a binding determination. On a subsequent appeal the defendant would normally be precluded from arguing those same assignments of error which had actually been passed on. The reason for this is simply that those assignments, supported by the same proof, with the same objections and exceptions, would be as much without merit on the second appeal as on the first.

On the previous appeal appellant argued only nine points in his brief. This Court in its opinion thoroughly discussed only two of these points and generally discussed the remaining seven points in the following language: "Appellant argues several other points, all of which we have examined, but we find no error other than the giving of Instruction No. 9." Yet the record in the first appeal reveals that no less than 64 assignments of error were contained in the motion for new trial. It is my view that those assignments not argued in the nine points upon which this Court actually passed do not become the "law of the case".

The majority under the heading "EVIDENCE OF GOOD CHARACTER OF DECEASED" devotes the major portion of its opinion to an assignment of error which was contained in appellant's motion for new trial in the first appeal. After a careful re-reading of the briefs in that case I have been unable to find one word of argument relative to this assignment contained in the nine points upon which this Court actually passed. Except for the discovery of the absence of an objection to testimony, of the good character of the deceased, on the first appeal, according to the majority opinion, consideration of this assignment also would have been foreclosed under their rule of "the law of the case."

Under my view this assignment is properly before this Court regardless of the absence of an objection in the previous trial, since this Court did not actually pass upon this matter on the first appeal. With the point properly before us I am convinced that the majority opinion has effectively held that the entry of a plea of self-defense in a homicide case is sufficient to allow the prosecution to introduce evi-

dence of the deceased's reputation for peace and quiet in rebuttal.

It has never been the rule in homicide cases in this State to allow the prosecution to introduce evidence of the deceased's reputation for peace and quiet when the issue of self-defense is raised. As was said in BLOOMER v. STATE, 75, Ark. 297, 87 S. W. 438: ". . . It is now well settled that such evidence on the part of the prosecution should not be admitted unless the defendant has undertaken to attack the character of the deceased in that respect. BEN v. STATE, 37 Ala. 103: Bishop, Crim. Proc. 3rd Ed., §612."

That rule was reaffirmed in CARR v. STATE, 147 Ark. 524, 227 S. W. 776; and in FISHER v. STATE, 149 Ark. 48, 231 S. W. 181. As Justice Wood observed in BRIDGES v. STATE, 169 Ark. 335, 275, S. W. 671, the CARR and BLOOMER cases are not in conflict on this point:

> ". . . . As stated in the opinion, the question presented by the record in the CARR case was 'whether a character witness who testified to the good reputation of the deceased could, on cross-examination, be interrogated concerning specific acts of violence on the part of the deceased within the personal knowledge of the witness to test the soundness of the statement of the witness tending to establish the good character of the deceased'.
>
> "The question in the case at bar, therefore was not presented and not under consideration in the CARR case, and it was not in the thought of the court in that case to announce a doctrine in conflict with the decision of this court in BLOOMER v. STATE, supra,

which doctrine has been since approved in FISHER v. STATE, supra. Taking the opinion of the CARR case in connection with the facts of that case, the language upon which the Attorney General relies, only meant that the general reputation of the deceased for peace and quiet was admissible in evidence by the State to rebut the testimony given by the defendant in which an attack had been made upon such reputation, and therefore the CARR case is not out of harmony with our former decisions." (Emphasis supplied.)

I do not agree with the majority in their conclusion that a plea of self-defense was not entered in the Bridges case, supra. Be that as it may, in my view neither the CARR case nor the BRIDGES case, as to the facts contained therein, aid the Court in deciding the present appeal since it was assumed in both instances that the defendant's testimony was or was not an attack on the deceased's reputation for peace and quiet.

Certainly the right of a defendant upon entry of a plea of self-defense to show that the deceased was a violent and dangerous man cannot be questioned. PALMORE v. STATE, 29 Ark. 248; EDWARDS v. STATE, 208 Ark. 231, 185 S. W. 2nd 556. In every case where the defendant has introduced evidence in support of his plea the issue remains to be decided whether that evidence constituted an attack on the deceased's reputation for peace and quiet that would allow the prosecution to offer evidence of the deceased's good reputation in rebuttal. CARR v. STATE, supra; BRIDGES v. STATE, supra.

In the case at bar the defendant's evidence was not sufficient to constitute a general attack on the deceased's

reputation for peace and quiet to allow the prosecution to offer evidence in rebuttal. Although the incidents that were related in the testimony did occur over a period of time, in each instance the testimony tended to show only the ill feeling and animosity of the deceased toward the defendant.

Under this view BRYANT v. STATE, 95 Ark. 239, 129 S. W. 1101, is distinguishable from the present case. As that portion of the opinion quoted by the majority indicates the widow of the deceased testified on cross-examination that the deceased "was quick to get mad and fight, and he was a brave man, and would fight at the drop of a hat." This testimony clearly was a direct attack on the reputation of the deceased, whereas the testimony in this case is evidence of the ill feeling of the deceased toward the defendant and that the deceased was the aggressor.

The cases cited in the majority opinion from foreign jurisdiction announcing a doctrine contrary to our own, might be persuasive to me if this were a matter of first impression in this state, but, as indicated above, such is not the case. The text writers have long recognized the existence of the minority rule, and have never placed Arkansas in that group. 1 Wigmore, Evidence, §63 (3d Ed. 1949); Note, 3 Ark. L. Rev. 464 (1949); Anno. 34 A. L. R. 2d 451 (1954). Therefore, it is my opinion that whatever may be the ruling elsewhere. I consider our own cases sound, and here refuse to be a party to the extension of our basic rules of criminal procedure. For the reasons stated above, I respectfully dissent.

(This man was brought into the court room on an ambulance stretcher.)

MR. CALVIN TYLER

Called as a witness on behalf of the State of Arkansas, after being duly sworn, testified as follows:

DIRECT EXAMINATION

BY THE COURT: May I announce, that if there are any witnesses in the court room, under the rule, you will have to leave the court room.

BY MR. GORDON:

Q. What is your name?

A. Calvin Tyler.

Q. Where do you live?

A. I live out here on North Griffin.

Q. Were you in Conway on October 13, 1958?

A. Yes, sir.

Q. What were you doing down there?

A. The doctor that had been treating me lived there, and I took his medicine up until about Christmas time, and I went down there to have my prescriptions refilled.

Q. Just tell us what happened, please.

A. I went down ther and I had my prescriptions refilled, and I paid my burial insurance, and the boy was getting ready to go home; I bought some apples and stuff at a fruit stand there in Conway.

Q. Is that on Vanronkle?

A. Yes, sir. And I carried it and put it in the car. The boy was in the car. Son said, "I would like to go over to Clarence Day's before I leave." We left the car and went back by the fruit stand and walked down—just a short ways—just a short ways from the fruit stand down the street, we went back toward Mr. Day's store, and we cut angling right across the street, and when we got three-fourths of the way across the street, I discovered a man—do you have some water handy, my throat is awful dry—(HANDS WITNESS A DRINK.)—Thank you. He was up there on the corner of the sidewalk three or four steps, he was nearly in front of the door. I believe it was a furniture store door, the best that I remember, not much quicker than my eyes flashed on him, there was another man came out of that door, I just stepped back from the door, he made a step toward this man and they went together, and as they went together, arms went up and down, the gun fired. This man and the other man had sort of clinched on him and he leaned over on the sidewalk, seems like he had to pull his left arm from him, and the man dropped and at that time my son—he was excited about me, me being in the condition that I was in, and he whirled me and took me back up to the fruit stand at the upper end of the street.

Q. Who was it that stepped out of the doorway?

A. That was Mr. Mode.

Q. How long have you known Mr. Mode?

A. I have been personally knowing him for twelve or fifteen years.

Q. When did you first see the gun?

A. When it went up.

Q. Did you ever see Mr. Mode take the gun out of his pocket?

A. I never did.

Q. This happened in front of the Farmers Supply Store?

A. That is right.

Q. Is that the doorway that you saw him step out of?

A. Yes, sir.

Q. Are you sure that he came out of that doorway?

A. He was either standing back, I will say four feet or else he came out of it at that time.

Q. He came out in front of the man that got shot?

A. Yes, sir.

MR. GORDON: That is all.

CROSS EXAMINATION

BY MR. HARDIN:

Q. Mr. Tyler, you say that he either came out or he was standing about four feet back?

A. Yes, sir, back in the door way.

Q. Had you seen either of these men before that time?

A. No, sir. Just what I seen of them at that time.

Q. As they went together?

A. Yes, sir, as they went together.

Q. And clinched?

A. Yes, sir.

Q. Did you see the other man with his arm around Mode's neck?

A. He had his right arm—I am most sure that he was trying to reach around his shoulder and catch his right arm.

Q. I am not asking you what you are most sure of. That right arm was around his neck?

A. Yes, sir, it was around him.

Q. And you had not seen him come up and you don't know what he said to Mr. Mode or what Mr. Mode said to him, had you?

A. No, sir, I hadn't heard a word.

Q. And you were how far away?

A. I supopse I was 60 or 70, could have been 100 feet but I don't think that it was.

Q. Was that back east?

A. Yes, sir, that was back east from where it happened.

Q. Did you see the Chief of Police up there?

A. Yes, sir.

Q. He came on down there didn't he?

A. Yes, sir.

Q. Did you see young Elmer Joe Swaffar?

A. I wouldn't say that I did. I seen two other men across the street before I seen them.

Q. The man that was killed, how far had you seen him walk?

A. Just about a good step.

Q. And back of that you hadn't seen him of course?

A. No, sir.

Q. And you had not seen Mr. Mode before the time that you are telling about?

A. When I seen him make that step toward him.

Q. You were back 60 or 70 feet east?

A. Something like that. I wouldn't be positive.

Q. Were you on the sidewalk or were you in the street?

A. I was just about four feet in the street when I first discovered them, but by the time I made that step or two steps, you might say it was all over with.

Q. Your son was with you?

A. Yes, sir.

Q. Did he see the same thing that you did?

A. I wouldn't be positive that he saw it just exactly like I saw it, I wouldn't say that, because I don't know. He saw them when they clinched, I am almost sure of that.

Q. Of course, Mr. Tyler, is it true—could there be a mistake as to whether he was in the door or came out of the door or standing back, you don't know which?

A. I wouldn't be positive, now, how he was, he made appearance toward him.

Q. He made an appearance toward the other person?

A. Yes, sir, he made a step.

Q. And the other man made an appearance toward him?

A. He seemed to be kind of straight, and then he just whirled to the side.

Q. You mean he was walking up the sidewalk straight?

A. Yes, sir.

Q. You saw no pistol or gun at that time?

A. No, sir, not at that time.

Q. You didn't see a gun until after they clinched?

A. No, sir, I didn't.

MR. HARDIN: That is all.

RE-DIRECT EXAMINATION

MR. GORDON:

Q. Your impression was that he came from where - - ?

MR. HARDIN: I object to his impression.

THE COURT: I think he has stated that he either stepped from the door or recess or three or four feet back.

Q. Was he behind the corner of the building where the building comes out?

A. Well, as I remember, those doors set something like that. He could have been standing back against those doors and stepped out or else the doors could have been open and he could have come out, I wouldn't be positive.

MR. CALVIN TYLER

Called as a witness on behalf of the State of Arkansas after being duly sworn testified as follows:

DIRECT EXAMINATION

MR. EDWARD GORDON:

Q. State your name, please.

A. Calvin Tyler.

Q. Mr. Tyler, would you face the jury now and talk so they can hear you please, sir.

A. I will do my best.

Q. What is your age?

A. I am past seventy-one.

Q. Where do you live?

A. I live here in Morrilton.

Q. What address?

A. North Griffin—803.

Q. Do you have a son named Edwin?

A. Yes, sir.

Q. Where does he live?

A. He lives here in Morrilton.

Q. Just around the corner from your house?

A. Yes, sir.

Q. Have you ever lived in Faulkner County?

A. Yes, sir.

Q. How long ago?

A. This past March was two years ago I moved from Conway.

Q. Were you living down in Faulkner County at that time two years ago?

A. Wait now, it might have been three years ago.

Q. Where did you live down there?

A. I lived about a mile down on 65 Highway, south of Conway.

Q. Have you had a stroke or heart attack recently?

A. Well, not too long ago I was in the hospital at Christmas. I believe it was in July that I had an attack.

Q. Did you have one before you left Faulkner County?

A. Yes, sir, I did.

Q. Did vou have a doctor down there?

A. Yes, I did.

Q. Who was the doctor?

A. I first called Dr. Edd Dunaway and it didn't seem to me that he was doing what he should and I called Dr. Banister.

Q. Was he your doctor when you left Conway and came to Morrilton?

A. Yes, sir.

Q. Are you feeling all right this morning?

A. I sure don't feel good.

Q. Did you go to the doctor yesterday?

A. I did.

Q. Were you in Conway on October 13, 1958?

A. Yes, sir; I was.

Q. Why were you down there that day?

A. I went down there to get some prescriptions filled and to pay a burial association insurance.

Q. Was anyone with you?

A. Yes, my son, Edwin Tyler.

Q. Did you witness a shooting down there that day?

A. Yes.

Q. Where were you when it happened?

A. I was on that street that runs through by the Bank, I was a third if not half way across the street when it occurred. I was going angling across the street.

Q. Do you know where the Bakery is there on the north side of Vanronkle Street?

A. Yes, sir.

Q. With reference to the Bakery there where did you step off into the street?

A. It wasn't too far from the corner, somewhere along about there.

Q. The Farmers Supply, do you know where that is with reference to where you stepped off?

A. Yes.

Q. What direction is that?

A. That would be northwest, the way I was a going.

Q. You were walking northwest?

A. Yes, sir.

Q. Were you walking toward the Farmers Supply?

A. Well, mostly, not directly but mostly, just a few degrees off from that. We went on the curb just a little above—a little bit east.

Q. Will you tell the jury what you saw and what happened?

A. When I came across that street and was walking down that way I got over in the street a piece and I had done looked the street east and I flashed my eyes back west and there was a man stepped up on the curb coming right in front of the Farmers market store, and there was another man stepped a step toward him, and the man who stepped up on the curb he just whirled suddenly and went to grabbing for his right arm, he held his arm up; had his arm up like that (indicating) this man got his left arm about like that and was reaching around his shoulder trying to get ahold with his right arm, and this man had the gun in his hand—

MR. HOLT: We want to object to the witness testifying about what either man was trying to do.

THE COURT: He has a right to state what he saw.

MR. HOLT: That is right, that is correct, but just state what he saw, he doesn't know what he was trying to do, that calls for a conclusion.

MR. GORDON: He said he was reaching for his arm.

BY THE COURT: Just state what the conduct of the parties were—the conduct . . go ahead.

MR. HOLT: Note our exceptions.

A. As I said, he was reaching around his shoulder trying to get his right arm—

MR. HOLT: I object to what he was trying to do.

BY THE COURT: Your objection will be overruled.

MR. HOLT: Note my exceptions.

A. I was just telling what I seen and that is all that I know. The man with the gun he threw his whole body around like that (indicating) and the gun came down and I heard two shots, and the man went over the sidewalk kinda', kinda' shook the man loose from him and he fell on the sidewalk. At that time my son grabbed me and whirled me around, hoping, I guess, that I hadn't seen it, but it was done over. Took me up to the Curb Market on the corner up there away from the scene of it.

Q. Mr. Tyler, you said that one man fell to the sidewalk and one man had the gun. Now which man had the gun?

A. Mr. Mode, I suppose—well, I know that Mr. Mode had the gun.

Q. Did you know Lee Mode prior to that?

A. Just when I met him, that was all, I never did know nothing of him, only just acquaintance, just see him now and then.

Q. Did you know this other fellow, D. L. Russell?

A. No, sir. I wasn't acquainted with him whatever.

Q. Mr. Russell was the one that fell to the sidewalk?

A. Yes, sir.

Q. Which direction did he come from and which direction was he going?

A. He came from the west—the bank was west of where he was at. He was coming from toward the bank, came up from there—Now, where he had been I don't know.

Q. What direction was he facing?

A. He was facing the east.

Q. When you first saw Mr. Mode where was he and what direction was he facing?

A. He was facing the south.

Q. Will you take this picture No. 6 and point to the place that you first saw Mr. Mode.

A. The man that stepped up on the curb right along in here about the center of this. About the center of this walk and when he got to about there this man came from here coming south here and he just whirled suddenly as the man made the step toward him.

Q. Now just a minute. Could you point now to the place where you first saw Mr. Mode. Just point.

A. Just point and not mark?

Q. Yes.

A. He was about right there, (indicating).

Q. Was he inside the door way?

A. I wouldn t say he was on the inside or the outside.

Q. Was he against the building over there?

A. He was mighty close to the building, he made a step there.

Q. Which direction did he step?

A. He stepped south.

Q. At that time what direction was Mr. Russell facing?

A. He was facing east.

Q. What direction was Mr. Russell from Mr. Mode at that time?

A. He was south of Mr. Mode when he made the whirl.

Q. Would you make an "X" where Mr Mode was?

A. I will do my best, I am awful nervous.

Q. You put an "M" there where Mr. Mode was.

A. (Witness indicates with "M")

Q. Put an "M" there where you first saw Mr. Mode. Now, put an "R" there where Mr. Russell was . . . Now, put an "R" where Mr. Russell was when Mr. Mode stepped toward him.

A. (Witness indicates)

Q. Put a figure "2" there where the last "R" is.

A. (Witness indicates)

Q. You say that Mr. Russell was facing the east where you put the "R-2" . . . Mr. Russell was facing east?

A. Yes, sir.

MR. GORDON: Do you want to recess for a minute—Do you want to take a tablet?

WITNESS: Yes, sir, I am going to take one.

MR. GORDON: Do you want to take a recess?

WITNESS: No, sir, I want to get through.

Q. Mr. Tyler, will you take this revolver and show the jury how Mr. Mode was holding that gun. Could you stand up here just a minute?

A. Maybe so if I can get ahold of that. He had the gun up like that, at one time Mr. Russell's arm was like that (indicating).

Q. What was Mr. Russell doing with his left arm?

A. He had done caught ahold of his arm like that (indicating).

Q. And had his right arm around him?

A. Yes, sir. He was reaching like that.

Q. What was Mr. Mode doing with the gun while he was reaching like that?

A. He threw himself sideways like that, and Mr. Russell seemed to slip back and the gun came down.

Q. When the gun was still up in the air was it pointed up or down or sideways or what?

A. It was pointed up like that (indicating), but it seemed like he was trying to turn it this way.

Q. Can you point that gun down and pull the trigger?

A. No, sir, I don't have the strength.

Q. When was the first time that you saw the gun?

A. When he threw his arm up.

Q. When Mr. Mode stepped out where did he have his right hand?

A. Down to his side the best that I could tell about it.

Q. Were you in a position to see his right hand at that time?

A. No, sir, I couldn't.

Q. Why couldn't you?

A. I suppose—

THE COURT: No, don't suppose.

A. Mr. Russell came between me and Mr. Mode.

Q. Which side of his body did Mr. Mode have turned toward you at that time?

A. He had his left side toward me.

Q. And his right hand was down by his right side?

A. Yes, sir.

Q. When Mr. Russell made this grab which side of Mr. Mode's body did he go to, the right or the left side or bear hug him or what?

A. He reached for his right side, nearly face to face at that time.

Q. When did you first see the gun?

A. When his arm went up.

Q. How long was it between the time that you saw Mr. Mode step out there and Mr. Russell made this lunge and then shots were fired . . . how much time lapse was it between the time that you first noticed Mr. Mode and saw him take that step toward the south and the time you heard the gun?

A. I would rather say about ten seconds, maybe fifteen but I don't think it was fifteen though, just as quick as a wink it was all over before you could realize what was a-happening.

Q. This whole thing happened somewhere near that "No Parking" sign there on the sidewalk?

A. It was right in front of that door. Farmers Supply door. I didn't pay too much attention.

Q. About how far would you say that you were away from these two men when you saw what you have just described to the jury?

A. I thought it was about 60 or 70 feet, that is the way I guessed it, 60 or 70 feet; it could have been further and it could have been not hardly so far.

Q. Had Mr. Russell passed by Mr. Mode when Mr. Mode moved toward him?

A. No, sir.

Q. Was he about even with him?

A. Something near even with him.

Q. Did you hear either one of these men say anything?

A. No, sir, neither party.

CROSS EXAMINATION

MR. HOLT:

Q. Mr. Tyler, do you remember about what time of day it was?

A. The best that I remember it was—I would say 10:00 o'clock, 10:30, could have been maybe eleven.

Q. Do you remember the kind of day it was, whether it was cloudy or rainy or sun shining?

A. Best I remember it was a nice day, could have been partly cloudy.

Q. It was not raining?

A. No, sir, it was not raining.

Q. What day of the week did it happen on?

A. I believe it was on Monday.

Q. On Monday?

A. Yes, sir.

Q. Were there very many cars coming and going along there at that time?

A. No, sir.

Q. Traffic on the street was pretty scattery—scattered—wasn't much traffic on the street?

A. That is right.

Q. Did you see very many cars parked along the curb on Vanronkle or Spencer Street?

A. Not too many.

Q. Do you remember seeing any parked on the curb?

A. Seems to me like I seen one truck.

Q. Where was that truck if you remember?

A. I believe it was a truck.

Q. Did he pull up?

A. When I noticed the truck it was standing still, I wouldn't say if he pulled up or backed up or what.

Q. If you will take your cane and step around here, I want to point something out to you on your map. Stand right there so you won't block the jury.

A. Just a minute until I put on my glasses.

Q. This is Vanronkle Street, this is Front Street; this is Spencer Street, now where were you when you first noticed Mr. Mode and Mr. Russell. just point with this pencil.

A. This is the street that I was crossing.

Q. Were you over on this side?

A. I started from the south side of the street.

Q. You started from the south side of Vanronkle Street. Where were you going?

A. I started to Clarence Day's store.

Q. Clarence Day's Store is here and the back end comes out on Spencer Street and the front end comes out on Front Street. Were you going to his store to the back entrance?

A. Yes, sir.

Q. You had started to this store right there?

A. Yes, sir.

Q. You had started back down here somewhere. This is Markham Street here, now where did you leave the south sidewalk of Vanronkle Street to cross over to the north sidewalk of Vanronkle Street?

A. This is the Farmers Market, this is the front door right here to the Farmers Supply.

Q. Now, where did you start from? Where did you park your car? This is Markham Street here, this is south, this is north, this is east and this is west.

A. I believe that fruit stand was right along here, wasn't it? That is what I was thinking about. We started right here going in that direction.

Q. You got right along here somewhere?

A. Not far from this building here.

Q. This shows the Bakery this side here?

A. Yes, sir.

Q. Did you start angling across before you got to the Bakery?

A. Somewhere right along there.

Q. Right in the vicinity of the Bakery?

A. Yes.

Q. You started angling across?

A. Yes.

Q. Were you angling across to the sidewalk or were you coming to this corner?

A. I believe we were angling right here, to the sidewalk.

Q. That is a sign right there isn't it? There is a sign or post right in there?

A. There is a sign or post here somewhere near this curb of the sidewalk on the north side of Vanronkle.

Q. Were you coming on to the sidewalk back this way from the sign?

A. I believe that I caught ahold of the sign and stepped up on the sidewalk.

Q. You think that you did?

A. I am most sure that I did. I did.

Q. You did take ahold of the sign when you stepped up on the sidewalk?

A. Yes, sir.

Q. And when your son whirled you around and took you off.

A. That is where he whirled me around.

Q. When you took ahold of the sign that is when he whirled you around?

A. He seen the man fall.

Q. Where did he take you?

A. He took me to this fruit stand.

Q. Instead of going on to Clarence Day's Store he whirled you around and took you back to this fruit stand?

A. Yes, sir.

BY THE COURT: Is that all you need with him on the plat?

MR. HOLT: Yes, sir.

THE COURT: Let him take his seat back there.

Q. I believe that you stated awhile ago to Mr. Gordon that when you first saw Mr. Mode and the man that later turned out to be Mr. Mode he was walking in a southerly direction?

A. He stepped facing the south.

Q. And the deceased, Russell, was walking coming from the west going east in an easterly direction?

A. That is right.

Q. And to the best of your recollection at that time when you saw that you were 60 or 70 feet away?

A. Yes, sir, something like that.

Q. How far out in Vanronkle Street had you gotten at the time you first saw this?

A. Probably a third of the way or half the way, I wouldn't say.

Q. Something like a third or a half?

A. Yes, sir.

Q. Judging distance to the best of your recollection taking into consideration the rest of the street that you hadn't crossed and from then on down to where it happened you say 60 or 70 feet?

A. That is right.

MR. HOLT: That is all.

RE-DIRECT EXAMINATION

MR. GORDON:

Q. Where you stepped off is there a city light post there?

A. There was one right close, I didn't pay any attention, just how it sit or how far I was from it, but it was right close. We passed the city light post when we stepped into the street, I am sure of that.

Q. There in front of the Bakery?

A. That is right.

Q. And when you crossed over to the other side was there a light post over there somewhere near?

A. Not too far.

MR. GORDON: That is all.

RE-CROSS EXAMINATION

MR. HOLT:

Q. Which one of the light posts did you take ahold of?

A. Kind of a sign.

Q. When—Which one did you take ahold of?

A. I didn't notice the name that was on it or anything. I just reached up and caught ahold of it and sort of pulled my weight up on the sidewalk.

Q. Have you discussed this case with anyone since the last trial?

A. No, sir.

Q. You haven't even talked to the Prosecuting Attorney about it?

A. I talked to them just a little bit, but not too much. No long conversation.

Q. Where were you when you talked about it?

A. At my home.

Q. Did you go with them to the scene of the shooting?

A. Yes, sir, I did.

Q. A few days ago?

A. Yes, some few days or a week back, maybe a week or ten days, I wouldn't be positive.

Q. Who did you go with to the scene of the shooting?

A. I went with Mr. Gordon.

Q. Mr. Edd Gordon?

A. Yes, sir.

Q. And you talked about it then?

A. Well, yes, I believe that we did and I believe that he has spent twenty or thirty minutes with me since then.

RE-DIRECT EXAMINATION

MR. HARTJE:

Q. The sign that you took ahold of, how far was that from where the two men were?

A. I believe that I stated about 60 feet once or twice, it was something like that, I wouldn't be positive of the distance.

WITNESS EXCUSED.

MR. THOMAS G. STONE

Called as a witness on behalf of the defendant, after being duly sworn, testified as follows:

DIRECT EXAMINATION

MR. HOLT:

Q. What is your name, please, sir?

A. Thomas G. Stone.

Q. Where do you live?

A. Conway, Arkansas.

Q. How long have you lived there?

A. Ever since 1905, I was in Little Rock for about two and a half years until recently.

Q. What business were you in?

A. I have been in carpenter business, farming and then first one thing and the other.

Q. What was your latest line of business?

A. My latest business was carpenter

Q. Were you ever in the grocery business in Conway?

A. No, sir, I was in Little Rock.

Q. How long were you in the grocery business in Little Rock?

A. About two and a half years.

Q. How long have you been living in Conway since you came back from Little Rock?

A. About sixty days.

Q. About sixty days?

A. Yes, sir.

Q. When did you go to Little Rock?

A. Well, it will be three years—I would have stayed there three years if I had stayed there until December.

Q. Do you know Lee Mode?

A. Yes, sir.

Q. How long have you known him?

A. About forty some odd years.

Q. Do you know D. L. Russell, the deceased?

A. No, sir.

Q. Did you have an occasion to be in Conway, Arkansas, on October 13, 1958?

A. Yes, sir.

Q. Why were you there?

A. I went up to the Bank, to make a deposit at the Bank.

Q. What Bank?

A. The First National Bank.

Q. How long have you been doing business with the First National Bank at Conway?

A. About forty years.

Q. Did you make a deposit there that day?

A. Yes, sir.

Q. At the bank that morning?

A. Yes, sir.

Q. Approximately what time would you say?

A. I would say it was a little bit after ten o'clock. I didn't know for sure.

Q. The day of the shooting which was October 13, 1958, were you in Conway that morning?

A. Yes, sir.

Q. And you made a deposit there at the bank?

A. Yes, sir.

Q. After you made a deposit will you tell the jury here please, just what you saw and heard, if anything, in regard to the shooting there or the trouble between Lee Mode, the defendant, and D. L. Russell, the deceased?

A. I had just walked out of the bank and stopped on the corner fixing to go back to where my car was parked over at the Sale Barn. I was headed east when I came out of the bank and I saw Mr. Mode come south on Spencer and turn to go east, and I heard someone holler "Hey, there, old man" and it just drawed my attention, my standing there, and stopped and went to gazing at them and they went to kind of scuffling and there was a shot. That's about all I know about it.

Q. What direction was Mr. Mode walking in at the time you heard someone say—holler and say, "Hey there, old man"?

A. He came down Spencer going south and he turned to his left and started to go on east.

Q. What street was he on at that time? Do you remember?

A. Vanronkle, I believe it is.

Q. And Mr. Mode—like this is Spencer Street going south —you saw him coming down Spencer and turn to the left on Vanronkle and start east?

A. Yes, sir.

Q. And about that time you heard someone say, "Hey, there, old man"?

A. Yes, sir.

Q. Did you see the person that made the statement?

A. Yes, sir. But I didn't know him.

Q. You didn't know him?

A. No, sir.

Q. Did you later find out who it was?

A. Yes, sir.

Q. What direction was he going in at the time you saw him?

A. He was going east.

Q. The same direction that Mr. Mode was going?

A. That's right.

Q. I hand you a picture that has been introduced and marked Exhibit "E". I will ask you to look at that picture and see if you can identify the buildings there and if you can I want you to step over here.

A. Yes, sir. That's a feed store and this is the bank.

Q. All right. Step over here where you can point this out to the jury if you will, please. You will have to kind of get over there. What is this street?

A. This is Spencer.

Q. No, going up this way.

A. This is going up this way.

Q. No, going up this way. All right, you do it. Going back this way, where is the bank?

A. Right here. (Indicating)

Q. Where were you standing?

A. Right here. (Indicating) Right there on the corner.

Q. State whether or not at the time you were standing there you had a clear unobstructed view of the sidewalk in front?

A. I did. Just as clear as this is here.

Q. Why were you standing there on the corner near the bank?

A. I had just walked out there and stopped for the light to change. So I could walk across.

Q. Is there a stoplight there?

A. Yes, sir.

Q. What is this right here on the edge of the picture?

A. That's the stoplight.

Q. And you were waiting for the light to change so that you could proceed across the street and then on down Vanronkle Street in an easterly direction?

A. Yes, sir.

Q. When did you first see Mr. Mode?

A. When he came down this street right here (indicating) from the north. Come right down here and walked around here about even with that signboard. That's when somebody hollered at him "Hey there, old man."

Q. What did he do?

A. He turned around and he rushed right up to him and they went right into a clinch.

Q. Who rushed right up to him?

A. Well, Russell, I suppose. I didn't know who he was. But that's who they told me he was. They told me that was his name.

Q. This street that you are speaking of right in through here (indicating)—that is Spencer Street?

A. Yes, sir.

Q. I believe you have stated that you had a clear and unobstructed view of the corner of the sidewalk there in front of the Farmer's Supply Store where this trouble occurred?

A. Yes, sir.

Q. State whether or not you ever saw a gun in the hand of either party?

A. Never did.

Q. You never did see a gun?

A. No, sir.

Q. Did you hear any shots fired?

A. I heard a couple of shots.

Q. Were you looking at them when the shots were fired?

A. Yes, sir.

Q. What did you do when you heard the shots fired?

A. I just stood there. Stood there right where I was at. Didn't rush down there at all but stood there and watched.

Q. You didn't ever cross the street?

A. I finally crossed the street after I stood there a good little bit. I walked across the street and stopped on the next corner and stood there.

Q. What corner would that be?

A. That was the corner north Front and Vanronkle by Mr. Shaw's office. That's on Main Street there.

Q. How far approximately would that be from the sidewalk where the trouble was going on?

A. After I stopped last or the first time?

Q. The first time.

A. About a hundred and fifty feet.

Q. Now the last time—how far would it be?

A. Oh, about a hundred feet.

Q. While you were watching, did you see anyone fall to the sidewalk?

A. Yes, sir.

Q. Did you see anyone coming up to the scene where the trouble was?

A. Yes, sir. Few of them came up there that I knew.

Q. Who was the first person that reached the scene of the trouble that you knew?

A. I believe Elmer Joe Swaffar was the first one.

Q. Did you see the Chief of Police?

A. Yes, sir.

Q. And he arrived how long after the shooting took place? How long would you say it was before you saw the Chief of Police and Mr. Swaffar?

A. He was coming down the street at the time.

Q. The Chief of Police was coming down the street?

A. Yes sir. Coming from the east, walking west.

MR. NATHAN GORDON: We object, Your Honor. Let him ask how he was walking.

Q. All right. How was he walking? You said he was walking east, headed west—wasn't he?

MR. HOLT: He answered the question.

MR. GORDON: I know he did.

CROSS EXAMINATION

BY MR. HARTJE:

Q. You didn't testify in this last trial we had, did you?

A. No, sir.

Q. Why are you just now coming forward?

A. Nobody had asked me anything about it.

Q. Nobody had asked you anything about it?

A. No, sir.

Q. You suddenly get sleepy when I start asking you questions?

A. No, sir.

Q. Not a bit in the world? You yawn and wipe your face like this (indicating)—

BY MR. JACK HOLT: That's very improper and unkind and I'm going to object to such.

BY THE COURT: The jury will be admonished not to consider those remarks from the State. Go ahead and direct your questions. The jury will be admonished not to consider that.

Q. When did you first talk to Lee Mode about you knowing something about this instance?

A. I've never talked to him.

Q. Who did you talk to?

A. I talked to J. D. about three weeks ago—about the first of the month.

Q. You talked to J. D.?

A. Yes, sir.

BY THE COURT: J. D. Mode?

A. Yes, sir, J. D. Mode.

Q. What kin is J. D. to Lee Mode?

A. Son

Q. How well do you know J. D.?

A. Well, I know him about as well as you do, I guess.

Q. How long have you known him?

A. Well, ever since he was a little boy.

Q. How old is J. D.?

A. I don't know exactly.

Q. About how old do you think he is?

A. I think he's about forty—thirty-eight or thirty-nine or somewhere along in there.

Q. You just talked to J. D. about three weeks ago? Is that right?

A. Yes, sir.

Q. Who else did you talk to about what you know about this case?

A. That's all.

Q. That's all?

A. Yes

Q. You haven't talked to the attorneys here today?

A. Well, I said a few words to them. About as many as I did to you out there in the hall.

Q. And they put you on after knowing no more than what you had said to them? Is that what you are telling, Mr. Stone?

A. Yes.

Q. You say you were in Little Rock during this time?

A. Yes.

Q. Why were you putting money in the First National Bank in Conway, Arkansas?

A. I'd been putting money in there ever since I was ten years old.

Q. You drove all the way from Little Rock to put your money in the First National Bank? Is that what you want the jury to believe?

A. Sure.

Q. What were you doing in Little Rock?

A. Running a grocery store.

Q. What day of the week was this?

A. On Monday.

Q. Monday's a busy day with you, isn't it?

A. I had plenty of help.

Q. You had plenty of help?

A. Yes, sir.

Q. You came up here on Monday, the first day of the week, and made your deposit in the First National Bank?

A. That's right.

Q. That intersection—Front and Vanronkle Street—that you were standing on—what is on the northwest corner of that intersection?

A. Northwest corner where I was standing were the bank.

Q. What's on the northeast corner of that intersection?

A. Mr. Shaw's office.

Q. What's on the southeast corner?

A. Baker's Drugstore.

Q. What's on the southwest corner of that intersection?

A. I believe that boy's got a shop place in there—a jewelry store.

Q. That's in downtown Conway, it is not?

A. Yes, sir.

Q. Was there any traffic by there that morning?

A. Very little traffic.

Q. Any cars parked along the street that morning?

A. Not too many. There were a few, but not too many.

Q. Would you say two or three or four?

A. Oh, two or three.

Q. Ten or twenty?

A. No, two or three.

Q. Be closer to two or three?

A. Yes.

Q. You stood on the intersection there by the First National Bank and looked down the street and you said that you saw Mr. Mode walking down Spencer Street. Is that right?

A. Yes, sir.

Q. How could you do that with a building between you and Spencer Street?

A. I seen him come from down the street. There's an offset in there if you've got a picture of it—there's an offset in the building—Mr. Shaw's building doesn't stick out there as far as the feed store building does.

Q. Do you remember anyone standing on the intersection with you, Mr. Stone?

A. No, sir.

Q. I wish you would be very careful about this answer.

A. No, sir, I sure don't.

Q. You sure don't? Do you remember a red-headed woman standing on the same intersection with you, Mr. Stone?

A. No, sir.

Q. Mr. Stone, perhaps you wouldn't notice the red-headed woman but you would notice the man in his Navy uniform standing on the intersection. Do you remember seeing him stand there that morning?

A. No, sir.

Q. You do not?

A. No, sir.

Q. You say they were not there?

A. No, sir. I wouldn't say that they were there. I just don't remember. When I'm on business, I just walk up there. I don't look at everybody and stare at everybody that's on the street. I just walked out there and all I had on my mind was getting back to my car and getting back to Little Rock.

Q. Let me show you a plat of this area. Step right over here, please, sir. Can you look—please don't step in the way of the juror. Stand over there so you won't be in the way of the jury. Familiarize yourself with this plat first. Will you indicate on that plat where you were standing?

A. Right there. (Indicating)

Q. Right there where the mark is?

A. Yes, sir.

Q. Would you indicate where you saw the accident that you testified to?

A. Back on the sidewalk right along here. (Indicating)

Q. Right along there? (Indicating)

A. Yes, sir.

Q. About where that little round blue mark is? (Indicating)

A. Well, it was further out towards the edge of the sidewalk. Somewhere right along in there.

Q. Right along out toward the outer edge of the sidewalk?

A. Yes, sir.

Q. I believe you said that you did not see a pistol, Mr. Stone?

A. No, sir. I sure never.

Q. How old are you?

A. Well, my last birthday I had I was fifty-five years old.

Q. Did you say you are a native of Faulkner County?

A. Yes, sir.

Q. And you just moved away and the only time you've been gone from Faulkner County was this period while you lived in Little Rock?

A. Well, I've worked away a few times but I've never lived away. My family's always lived there.

Q. Basically you are a citizen and resident of Faulkner County?

A. Yes, sir.

Q. Mr. Stone, did you know that a first degree murder charge had been filed in this matter?

A. No, sir.

Q. You didn't know that?

A. No, sir.

Q. You have not read anything in the paper about the trials we've had on this matter?

A. Well, I've read a little in the paper. Not too much.

Q. Did you realize that you were an eye witness to this matter when it was all being tried?

A. No.

Q. You didn't?

A. No.

Q. You did say you saw it, didn't you?

A. Yes, sir.

Q. Then you are an eye witness, aren't you?

Q. A man died there on the corner of Vanronkle and Spencer, Mr. Stone. A man was shot?

A. Yes, sir.

Q. Another man was sentenced to twenty-one years in the penitentiary for doing it?

MR. HOLT: I object to that and ask that the jury be admonished not to consider that.

THE COURT: The jury will be admonished not to consider that question or the statement made by counsel.

MR. HARTJE: I'm sorry for making that statement.

THE COURT: Stay within the records. Stay within the means of competent testimony. That is not a proper statement and the jury will not consider it.

Q. Did you know anything about the tremendous search for witnesses that the Prosecuting Attorney's Office put on for about six months down in Faulkner County?

A. No, sir.

Q. How was Lee Mode dressed that day that you saw him?

A. Just about like he always has.

Q. Well, how is that?

A. Well, to tell you the truth about it—I don't remember exactly. I couldn't explain to you what kind of clothes he wore.

Q. Did he have a hat on?

A. Yes, sir.

Q. What kind of hat?

A. I believe it was a felt hat.

Q. Well, most all hats are felt hats, Mr. Stone. What style hat?

BY MR. HOLT: If the Court please, I object to the Prosecuting Attorney testifying—all hats are not felt hats.

BY THE COURT: His statement was not proper. He can ask him what kind of hat he had on.

Q. Was he smoking a cigarette down there that morning?

A. No, sir. He was not.

Q. He was not?

A. No, sir.

Q. Are you very sure he was not smoking a cigarette?

A. I wouldn't know.

Q. You wouldn't know?

A. No, sir.

Q. Did he have his hands in his pockets?

A. No, sir. Not that I seen.

Q. How was D. L. Russell—the man that got shot—how was he dressed?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. What was the first thing that the Chief of Police did when he got there to the body?

A. He just ran up there. I was so excited at that time that I really don't know what he did.

Q. You don't know what the Chief of Police did?

A. No. sir.

Q. You didn't get any closer to the scene than the front of the Shaw building?

A. That's right. I didn't just rush right on up there. I stood back over there and stayed out of the way.

Q. Were you there when the Police Car came and carried Mr. Mode away?

A. I was standing back there at the Shaw building on the corner.

Q. You were?

A. Yes. sir.

Q. Were you there when the ambulance came and carried D. L. Russell away?

A. Yes. sir.

Q. No further questions.

RE-DIRECT EXAMINATION

BY MR. HOLT:

Q. Would you stand over there, please sir. You stated in answer to the Prosecuting Attorney in cross examination something about where you were standing looking east on Vanronkle Street that there was an offset there which would make it easy for you to see a man coming round the corner off Spencer.

A. There is—if you have the scale.

Q. Well, here's a scale.

A. You can see it would be about that much. I don't know how many feet there is—ten or twelve feet that his building sets out a little further than this building.

Q. You state that when you are standing on this corner here that you can see a man coming down Spencer Street before he can turn the corner and go down Vanronkle Street east?

A. Yes, sir.

Q. And that's where you saw him coming from—down Spencer Street right in and about there?

A. Yes, sir.

Q. Because the buildings do angle that way?

A. Yes.

Q. Because that has been admitt[illegible] in evidence and that is a correct plat?

A. Yes, sir.

Q. And he turned to the left going down Vanronkle?

A. Yes, sir.

Q. You have done business there in Conway with your banker for many years. You know the banker's name?

A. Yes, sir. Sam Atkinson and Mr. Haller.

Q. Did you go to the bank to obtain evidence of the fact that you made a deposit on the morning of October 13?

THE COURT: I don't think you need to go into that.

MR. HOLT: They seem to doubt it. I just wanted to prove it.

Q. No further questions.

THE COURT: I just wanted to limit it.

A. I have the information right here.

MR. HOLT: They say they don't question your deposit.

WITNESS EXCUSED.

IN THE CONWAY COUNTY CIRCUIT COURT
STATE OF ARKANSAS

STATE OF ARKANSAS ..... PLAINTIFF

vs. No. 4014

LEE MODE ..... DEFENDANT

MOTION FOR NEW TRIAL

Comes the defendant, Lee Mode, and moves the court to vacate and set aside verdict of the jury herein rendered against him and grant him a new trial in this case, and for grounds says:

I.

The verdict of the jury is contrary to the law in the case.

II.

The verdict of the jury is contrary to the evidence in the case.

III.

The verdict of the jury is contrary to both the law and the evidence in the case.

IV.

The verdict of the jury is not sustained or supported by the evidence in this case.

V.

The verdict of the jury is not supported or sustained by the law in this case.

VI

The court erred in refusing to give the defendant's requested Instruction No. 2, to which ruling of the court the defendant at the time saved his exceptions.

VII

The court erred in refusing to give the defendant's requested Instruction lettered "A", to which ruling of the court the defendant at the time saved his exceptions.

VIII

The court erred in refusing to give the defendant's requested Instruction lettered "B", to which ruling of the court the defendant at the time saved his exceptions.

IX

The court erred in refusing to give the defendant's requested Instruction No. 6, to which ruling of the court the defendant at the time saved his exceptions.

X

The court erred in refusing to give the defendant's requested Instruction No. 7, to which ruling of the court the defendant at the time saved his exceptions.

XI

The court erred in refusing to give the defendant's requested Instruction No. 8, to which ruling of the court the defendant at the time saved his exceptions.

XII

The court erred in refusing to give the defendant's requested Instruction No. 9, to which ruling of the court the defendant at the time saved his exceptions.

XIII.

The court erred in refusing to give the defendant's requested Instruction No. 10, to which ruling of the court the defendant at the time saved his exceptions.

XIV.

The court erred in refusing to give the defendant's requested Instruction No. 11, to which ruling of the court the defendant at the time saved his exceptions.

XV.

The court erred in refusing to give the defendant's requested Instruction No. 13, to which ruling of the court the defendant at the time saved his exceptions.

XVI.

The court erred in refusing to give the defendant's requested Instruction No. 14, to which ruling of the court the defendant at the time saved his exceptions.

XVII.

The court erred in refusing to give the defendant's requested Instruction No. 15, to which ruling of the court the defendant at the time saved his exceptions.

XVIII.

The court erred in refusing to give the defendant's requested Instruction No. 16, to which ruling of the court the defendant at the time saved his exceptions.

XIX.

The court erred in refusing to give the defendant's requested Instruction No. 17, to which ruling of the court the defendant at the time saved his exceptions.

XX

The court erred in refusing to give the defendant's requested Instruction No. 18, to which ruling of the court the defendant at the time saved his exceptions.

XXI.

The court erred in refusing to give the defendant's requested Instruction No. 19, to which ruling of the court the defendant at the time saved his exceptions.

XXII.

The court erred in refusing to give the defendant's requested Instruction No. 20, to which ruling of the court the defendant at the time saved his exceptions.

XXIII.

The court erred in refusing to give the defendant's requested Instruction No. 22, to which ruling of the court the defendant at the time saved his exceptions.

XXIV.

The court erred in giving upon his own motion, Instruction No. 1, to which the defendant at the time objected and saved his exceptions.

XXV.

The court erred in giving upon his own motion, Instruction No. 2, to which the defendant at the time objected and saved his exceptions.

XXVI.

The court erred in giving upon his own motion, Instruction No. 3, to which the defendant at the time objected and saved his exceptions.

XXVII.

The court erred in giving upon his own motion, Instruction No. 4, to which the defendant at the time objected and saved his exceptions.

XXVIII.

The court erred in giving upon his own motion, over the objection of the defendant, the court's Instruction No. 5, to which the defendant at the time saved his exceptions.

XXIX.

The court erred in giving upon his own motion, over the objection of the defendant, the court's Instruction No. 6, to which the defendant at the time saved his exceptions.

XXX.

The court erred in giving upon his own motion, over the objection of the defendant, the court's Instruction No. 7, to which the defendant at the time saved his exceptions.

XXXI.

The court erred in giving upon his own motion, over the objection of the defendant, the court's Instruction No. 8, to which the defendant at the time saved his exceptions.

XXXII.

The court erred in giving upon his own motion his Instruction No. 9 over the general and specific objection of the defendant, to which ruling the defendant at the time duly saved his exceptions.

XXXIII.

The court erred in giving upon his own motion, over the objection of the defendant, the Court's Instruction No. 10, to which ruling of the court the defendant at the time saved his exceptions.

XXXIV.

The court erred in giving, upon his own motion, over the objection of the defendant, the court's requested Instruction No. 12, to which ruling of the court the defendant at the time saved his exceptions.

XXXV.

The court erred in giving, upon his own motion, over the objection of the defendant, the court's Instruction No. 13, to which ruling of the court the defendant at the time saved his exceptions.

XXXVI.

The court erred in giving, upon his own motion, over the objection of the defendant, the court's Instruction No. 14, to which ruling of the court the defendant at the time saved his exceptions.

XXXVII.

The court erred in giving upon his own motion, over the objection of the defendant, the court's Instruction No. 15, to which ruling of the court the defendant at the time saved his exceptions.

XXXVIII.

The court erred in giving upon his own motion, over the objection of the defendant, Instruction No. 16, to which ruling the defendant at the time saved his exceptions.

XXXIX.

The court erred in giving, upon his own motion, over the objection of the defendant, Instruction No. 17, to which ruling the defendant at the time saved his exceptions.

XL.

The court erred in refusing the defendant's request to excuse the juror, G. A. Gifford, for cause, to which ruling the defendant at the time saved his exceptions.

XLI.

The court erred in refusing to excuse, at the request of the defendant, the juror, Bill Clifton, to which ruling of the court the defendant at the time saved his exceptions.

XLII.

The court erred in overruling the defendant's objection to the testimony of the witness, Jerry Russell, as to "what would you do when Mr. Mode would come" and as to how often Mr. Mode would come and as to whether he would come when the father was away from home, to which the ruling the defendant at the time saved his exceptions.

XLIII.

The court further erred in admitting, over the defendant's objection, the testimony of the witness Jerry Russell

as to seeing his mother in the house with Mr. Mode when the father was gone.

XLIV.

The court erred in admitting, over the defendant's objection, the testimony of the witness, Jerry Russell, to the effect that he had heard words of "love" and "affection" pass between his mother and Mr. Mode, to which the defendant at the time saved his exceptions.

XLV.

The court erred in admitting, over the objection of the defendant, the testimony of the witness, Jerry Russell, that Mr. Mode "would always send me and the boys off to check the cows or something," to which ruling of the court the defendant at the time saved his exceptions.

XLVI.

The court erred in admitting, over the objection of the defendant, the testimony of the witness, Jerry Russell, to the effect that Mr. Mode would send him to count the cattle, etc., to which ruling of the court the defendant at the time saved his exceptions.

XLVII.

The court erred in admitting, over the objection of the defendant, the testimony of the witness, Jerry Russell, to the effect that his father was good to him, to which ruling the defendant saved his exceptions.

XLVIII.

The court further erred in admitting, over the objection of the defendant, that testimony of the witness, Jerry Russell, that his father was good to his mother, to which

ruling of the court the defendant at the time saved his exceptions.

XLIX.

The court erred in admitting, over the objection of the defendant, the testimony of the witness, Jerry Russell, as to what his father's feelings were against Mr. Mode, to which ruling of the court the defendant at the time saved his exceptions.

L.

The court erred in admitting, over the objection of the defendant, the testimony of the witness, Jerry Russell, to the effect that their home was not a happy home prior to the mother's leaving, to which ruling of the court the defendant at the time saved his exceptions.

LI.

The court erred in permitting the witness, Darrell Russell, an eight year old boy, to qualify as a witness, over the objection of the defendant, to which ruling of the court the defendant at the time saved his exceptions.

LII.

The court erred in admitting the testimony of the witness, Van Sellers, over the objection of the defendant, to the effect that none of the members of the family knew the whereabouts of Mildred Russell, his daughter, and that Mrs. Russell did not contact any members of the family, to which ruling the defendant at the time saved his exceptions.

LIII.

The court erred in permitting, over the objection of the defendant, the testimony of the witness, Ted L. Welborn,

to the effect that D. L. Russell was cooperative in a search, to which ruling the defendant at the time saved his exceptions.

LIV.

The court erred in permitting, over the objection of the defendant, the testimony of the witness, W. O. Condray, to the effect that he was standing in the window of the barber shop and saw all the things that he had testified to, to which ruling of the court the defendant at the time saved his exceptions.

LV.

The court erred in refusing, over the objection of the defendant, to permit the witness, Elmer Joe Swaffar, to testify to the statement which he heard Mr. Mode make immediately after the shooting, at the scene of the shooting, while standing by the doorway at the time, with the gun in his pocket, as follows, "The first thing that he said, I told him to stop, and he said "No, you old son-of-a-bitch, I am going to kill you". That is the exact words I told you before." To the ruling of the court in holding this to be self-serving and not part of the res gestae, the defendant at the time saved his exceptions.

LVI.

The court erred in refusing to permit the witness, Dave Ward, over the objection of the defendant, to testify to the purpose of undertaking to send the deceased Russell and family to Texas for employment, to which ruling of the court the defendant at the time saved his exceptions.

LVII.

The court erred in permitting the prosecuting attorney to ask the witness Ward, over the objection of the defendant, if he did not owe Lee Mode $30,000.00 at the time of the shooting, and his reply thereto, "I think maybe I did", to which ruling of the court the defendant at the time saved his exceptions.

LVIII.

The court erred in refusing to permit defense counsel to ask the question and defendant to answer the question of witness, Dave Ward, if Lee Mode did not recommend to him to ask the deceased Russell to go to Texas, to which the defendant at the time saved his exceptions.

LIX.

The court erred in permitting the witness, Tommy Lawrence, over the objection of the defendant, to testify as to conversation purportedly had with witness Elmer Joe Swaffar, purportedly after the shooting involved in this case, to which ruling the defendant at the time saved his exceptions.

LX.

The Court erred in permitting the witness, E. A. Dickens, to testify as to the reputation of D. L. Russell, over the objection of the defendant, to which the defendant at the time saved his exceptions.

LXI

The court erred in admitting, over the objection of the defendant, incompetent, irrelevant and inadmissible

testimony, to which the defendant at the time saved his exceptions.

LXII.

The court erred in refusing to admit competent and relevant testimony offered by the defendant and to which the State objected, and to which rulings, in each case, the defendant duly saved his exceptions.

LXIII.

The verdict of the jury in this case was rendered under the influence of passion and prejudice, on account of which the verdict should be vacated and set aside.

LXIV

The evidence in this case and the law is wholly insufficient to sustain the verdict and the verdict is entirely contrary to the evidence in the case.

WHEREFORE, the defendant respectfully prays that the court vacate and set aside the verdict of the jury herein and grant him a new trial, and for such other relief as he may be found entitled to receive.

CLAY BRAZIL and
HARDIN, BARTON, HARDIN & GARNER

s G. C. Hardin

By G. C. Hardin

Attorneys for the Defendant

IN THE CONWAY COUNTY CIRCUIT COURT

STATE OF ARKANSAS ..... PLAINTIFF

vs. No. 7117

LEE MODE ..... DEFENDANT

MOTION FOR NEW TRIAL

Comes the defendant and moves the court to set aside the verdict and conviction herein, and grant him a new trial and for ground says:

I.

The verdict is contrary to the law in the case.

II.

The verdict is contrary to the evidence in the case.

III.

The verdict is contrary to and is not supported by the law and the evidence in the case.

IV.

The verdict is not sustained by sufficient evidence in the case.

V.

The court erred in overruling the defendant's motion, at the conclusion of the evidence in the case, to instruct the jury to return a verdict of not guilty of the charge of murder in the second degree, to which the defendant at the time objected and duly saved his exceptions.

VI.

The court erred in refusing the defendant's request to instruct the jury, at the conclusion of the evidence in the case, to return a verdict of not guilty of the charge of manslaughter, to which the defendant at the time objected and duly saved his exceptions.

VII.

The court erred in refusing the defendant's request to instruct the jury to return a verdict of not guilty in the case, to which the defendant at the time objected and duly saved his exceptions.

VIII.

The court erred in giving, over the objection of the defendant, Instruction No. 1, given at the court's own motion, to which the defendant at the time objected and duly saved his exceptions.

IX.

The court erred in giving on his own motion, over the objection of the defendant, the court's instruction No. 2, to which the defendant at the time objected and duly saved his exceptions.

X.

The court erred in giving on his own motion, over the objection of the defendant, the court's Instruction No. 4, to which the defendant at the time objected and duly saved his exceptions.

XI.

The court erred in giving on his own motion, over the objection of the defendant, the court's Instruction No. 5, to which the defendant at the time objected and duly saved his exceptions.

XII.

The court erred in giving on his own motion, over the objection of the defendant, the court's Instruction No. 6, to which the defendant at the time objected and duly saved his exceptions.

XIII

The court erred in giving on his own motion, over the objection of the defendant, the court's Instruction No. 7 to which the defendant at the time objected and duly saved his exceptions.

XIV.

The court erred in giving upon his own motion, over the objection of the defendant, the court's Instruction No. 8, to which the defendant at the time objected and duly saved his exceptions.

XV.

The court erred in giving upon his own motion, over the objection of the defendant, the court's Instruction No. 9, to which the defendant at the time objected and saved his exceptions.

XVI.

The court erred in giving upon his own motion, over the objection of the defendant, the court's Instruction No.

10, to which the defendant at the time objected and duly saved his exceptions.

XVII.

The court erred in giving upon his own motion, over the objection of the defendant, the court's Instruction No. 11, to which the defendant at the time objected and duly saved his exceptions.

XVIII.

The court erred in giving upon his own motion, over the objection of the defendant, the court's Instruction No. 12, to which the defendant at the time objected and duly saved his exceptions.

XIX.

The court erred in giving upon his own motion, over the objection of the defendant the court's Instruction No. 13, to which the defendant at the time objected and duly saved his exceptions.

XX.

The court erred in giving upon his own motion, over the objection of the defendant, the court's Instruction No. 14, to which the defendant at the time objected and duly saved his exceptions.

XXI.

The court erred in giving upon his own motion, over the objections of the defendant, the court's Instruction No. 15, to which the defendant at the time objected and duly saved his exceptions.

XXII.

The court erred in giving upon his own motion, over the objection of the defendant, the court's Instruction No. 16, to which the defendant at the time objected and saved his exceptions.

XXIII.

The court erred in giving upon his own motion, over the objection of the defendant, the court's Instruction No. 17, to which the defendant at the time objected and saved his exceptions.

XXIV.

The court erred in giving upon his own motion, over the objection of the defendant, the court's Instruction No. 18, to which the defendant at the time objected and saved his exceptions.

XXV.

The court erred in giving upon his own motion, over the objection of the defendant, the court's Instruction No 19, to which the defendant at the time objected and duly saved his exceptions.

XXVI.

The court erred in refusing to give the defendant's requested Instruction No. 1, to which ruling the defendant at the time objected and duly saved his exceptions.

XXVII.

The court erred in refusing to give the defendant's requested Instruction No. 2, to which ruling the defendant at the time objected and duly saved his exceptions.

XXVIII

The court erred in refusing to give the defendant's requested Instruction No. 4, to which ruling the defendant at the time objected and duly saved his exceptions.

XXIX

The court erred in refusing to give the defendant's requested Instruction No. 8, to which ruling the defendant at the time objected and duly saved his exceptions.

XXX

The court erred in admitting, over the objection of the defendant, the testimony of Jerry Russell, given at a former trial, to all of which the defendant at the time objected and duly saved his exceptions.

XXXI

The court erred in overruling the defendant's objection to the testimony of the witness, Jerry Russell, as to "what would you do when Mr. Mode would come" and as to how often Mr. Mode would come and as to whether he would come when the father was away from home, to which ruling the defendant at the time saved his exceptions.

XXXII

The court further erred in admitting, over the defendant's objection, the testimony of the witness, Jerry Russell, as to seeing his mother in the house with Mr. Mode when the father was gone.

XXXIII

The court further erred in admitting, over the defendant's objection, the testimony of the witness Jerry Rus-

sell as to seeing his mother in the house with Mr. Mode when the father was gone.

XXXIV.

The court erred in admitting, over the defendant's objection, the testimony of the witness, Jerry Russell to the effect that he had heard words of "love" and "affection" pass between his mother and Mr. Mode, to which the defendant at the time saved his exceptions.

XXXV.

The court erred in admitting, over the objection of the defendant, the testimony of the witness, Jerry Russell, that Mr. Mode "would always send me and the boys off to check the cows or something", to which ruling of the court the defendant at the time saved his exceptions.

XXXVI.

The court erred in admitting, over the objection of the defendant, the testimony of the witness, Jerry Russell, to the effect that Mr. Mode would send him to count the cattle, etc., to which ruling of the court the defendant at the time saved his exceptions.

XXXVII.

The court erred in admitting, over the objection of the defendant, the testimony of the witness, Jerry Russell, to the effect that his father was good to him, to which ruling the defendant at the time saved his exceptions.

XXXVIII.

The court erred in admitting, over the objection of the defendant, that testimony of the witness, Jerry Russell, that his father was good to his mother, to which ruling of

the court the defendant objected and duly saved his exceptions.

XXXIX.

The court erred in admitting, over the objection of the defendant, the testimony of the witness, Jerry Russell, as to what his father's feelings were against Mr. Mode, to which ruling of the court the defendant at the time saved his exceptions.

XL.

The court erred in refusing, over the objection of the defendant, to permit the witness, Elmer Joe Swaffar, to testify to the statement which he heard Mr. Mode make immediately after the shooting, at the scene of the shooting, while standing by the doorway at the time, with the gun in his pocket, as follows. "The first thing that he said, 'I told him to stop, and he said "No, you old son-of-a-bitch, I am going to kill you".' That is the exact words I told you before." To the ruling of the court in holding this to be self-serving and not part of the res gestae, the defendant at the time saved his exceptions.

XLI.

The court erred in permitting, over the objection of the defendant, the testimony of the witness, Ted L. Welborn, TO THE EFFECT that D. L. Russell was cooperative in a search, to which ruling the defendant at the time saved his exceptions.

XLII.

The court erred in admitting over the objection and exceptions of the defendant, the testimony of Ted Wel-

born, a witness for the State, in rebuttal, concerning the reputation of Charles Hartsell, to the effect that it was bad, to which ruling of the court the defendant at the time objected and duly saved his exceptions.

XLIII.

The court erred in admitting the testimony of Ted L. Welborn, over the objection and exceptions of the defendant, to the effect that the reputation of D. L. Russell, was good, that he was a peaceable, law-abiding citizen; to which ruling of the court the defendant at the time objected and duly saved his exceptions.

XLIV.

The court erred in admitting over the objection and exceptions of the defendant, the testimony of Ted Welborn to the effect that his testimony as to the reputation of Charles Hartsell was based partly upon his going to Hartsell's house and circumstances found at the house, to which the defendant at the time objected and duly saved his exceptions.

XLV.

The court erred in permitting the witness, Tommy Lawrence, over the objection of the defendant, to testify as to conversation purportedly had with witness Elmer Joe Swaffar, purportedly after the shooting involved in this case, to which ruling the defendant at the time saved his exceptions.

XLVI.

The court erred in admitting, over the objection and exceptions of the defendant, the testimony of the witness

Hall as to his conversation with the deceased, Russell, at the scene of the affray on the occasion that he came upon him and Mode in the pasture, to the effect that Russell told him of the trouble he was having with Mode, and told him Mode had attempted to shoot him and that he had taken the pistol away from Mode, to all of which the defendant at the time objected and saved his exceptions.

XLVII.

The court erred in permitting the State to introduce in evidence the testimony of Darrell Russell, an eight year old boy, to qualify as a witness, over the objection of the defendant, to which the defendant at the time objected and duly saved his exceptions.

XLVIII.

The court erred in admitting, over the objection of the defendant, the testimony of Van Sellars to the effect that the family had not seen Mrs. Russell and she had not contacted any of the family, to which the defendant at the time objected and duly saved his exceptions.

XLIX

The court erred in admitting, over the objection and exceptions of the defendant, the part of the testimony of Calvin Tyler, wherein he says that "one man was trying to get ahold with his right arm", to which the defendant objected and saved his exceptions.

L

The court erred in overruling the objection of the defendant, to the testimony of Floyd Womack, on behalf of the State, wherein he said he supposed Mr. Mode saw the

Chief of Police, over the objection and exception of the defendant, to which defendant objected and saved his exceptions.

LI.

The court erred in admitting, over the objection and exceptions of the defendant, the testimony of Mrs. Clara Eggleston, a resident of Sallisaw, Oklahoma, to the effect that Mr. Mode lived in her trailer court in August, 1959, and that a woman whom she knew as Mildred Mode, lived with him, and, further, to the introduction of photographs offered in evidence by the witness, the same being State's Exhibits 19, 20, 21, 22, 23, and 24, to all of which the defendant at the time objected and duly saved his exceptions.

LII.

The court erred in instructing the jury, over the objection and exceptions of the defendant, that said testimony was admissible for the purpose of showing motive for the killing and the relationship of Mode and Mildred Russell prior to the killing, to all of which the defendant at the time objected and duly saved his exceptions.

LIII.

The court erred in admitting the testimony of Clida Barnett to the effect that she identify State's Exhibits 12, 20, 21, 22, 23, and 24 as pictures of Mildred Russell, over the objection and exceptions of the defendant; and in instructing the jury in connection therewith that said testimony was admitted to show the association of Mildred Russell and Lee Mode for the purpose of shedding light

upon the motive for the killing to all of which the defendant at the time objected and duly saved his exceptions.

LIV

The court erred in admitting the testimony of Mrs. Carolyn Fargo, over the objection and exceptions of the defendant, in identifying the pictures shown as State's Exhibits 19, 20, 21, 22, 23 and 24, as being photographs of Mildred, and to the effect that she saw Mode and Mildred Russell at Sallisaw, Oklahoma, to all of which the defendant at the time objected and saved his exceptions.

LV

The court erred in instructing the jury to consider the testimony of Mrs. Fargo for the purpose of showing motive and the relationship between Mildred Russell and the accused, Lee Mode, prior to the time of the killing, to all of which the defendant at the time objected and saved his exceptions.

LVI.

The court erred in sustaining the State's objection to defendant's questioning of the witness Ward to the effect that he undertook to send the deceased, Russell, and wife to Texas and offered them employment at his plant there, so as to get them away and avoid trouble between Russell and Mode, to which ruling of the court the defendant at the time objected and saved his exceptions.

LVII.

The court erred in sustaining the State's objection to the defendant's questions of the witness Ward and the defendant offering to prove by him the deceased Russell's

attitude toward Mode, his feeling and his threats toward Mode, and further refusing to permit the defendant to prove by said witness Ward; Ward's efforts to induce the deceased Russell to take employment elsewhere in order to avoid conflict and trouble between Russell and Mode, to all of which offers on the part of the defendant, the State objected and its objections were sustained by the court; to which the defendant at the time duly saved his exceptions.

LVIII.

The court erred in instructing the jury, at the request of the State, and over the objection and exceptions of the defendant, concerning the testimony of George W. Robinson, that they were to consider his testimony only as to shedding light upon the feeling between the parties; that is, between the deceased Russell and Mode, as to who was the probably agressor to which ruling and instructing of the court the defendant at the time objected and saved his exceptions.

LVIV.

The court erred in instructing the jury as to the testimony of the witness Cox, in which he said that he did not want Mode hanging around and further threatening him, and the defendant objected to the court's instruction that the testimony was admissible only if it constituted a threat and tended to shed light on the ill will between the parties; the defendant and the deceased, and who may have been the probably aggressor at the time of the final trouble, to which the defendant objected and saved his exceptions.

LV

The court erred in sustaining the State's objection to the offered testimony of Charles Heartsill to the effect that Russell threatened Mode at the home of his son, Gerald Mode, the court's instruction being it was admitted for the purpose of shedding light, if it did shed light, on the ill will and feeling between the parties, the deceased, Russell, and the defendant, Lee Mode, and who may have been the probably aggressor, to which the defendant objected and duly saved his exceptions.

LVI.

The court erred with reference to the questioning of Bruce Henderson as to threats of Russell toward Mode, and his procuring a pistol for the purpose of using it on Mode, and the court's instructing the jury that it was to consider this testimony only to show the state of mind between the parties, Mode and the deceased, as to who was the probably aggressor, to which the defendant at the time objected and duly saved his exceptions.

LVII.

The court erred in admitting, over the objection of the defendant, incompetent, irrelevant, and inadmissible testimony, to which the defendant at the time objected and saved his exceptions.

LVIII.

The court erred in refusing to admit competent and relevant testimony offered by the defendant, and to which the State objected, and to which rulings, in each case, the defendant duly saved his exceptions.

LVIX

The verdict in this case was rendered under the influence of passion and prejudice, on account of which the verdict should be vacated and set aside.

LX

The evidence in this case and the law is wholly insufficient to sustain the verdict and the verdict is entirely contrary to the evidence in the case.

LXI

The verdict of the jury in this case is not supported by sufficient evidence to establish the crime of second degree murder. The record, therefore, discloses that the evidence in the case wholly fails to sustain the verdict of the jury and the judgment of the court on a charge and conviction of second degree murder.

WHEREFORE, the defendant respectfully prays that the court vacate and set aside the verdict of the jury herein and grant him a new trial, and for such other relief as he may be found entitled to receive.

CLAY BRAZIL, JACK HOLT
and HARDIN, BARTON & HARDIN

By: G. C. HARDIN

G. C. HARDIN

Attorneys for Defendant

FILED NOV. 23, 1960.

MILLARD RICHARDSON, CLERK

IN THE ARKANSAS SUPREME COURT

LEE MODE APPELLANT

Vs. No. 5011

STATE OF ARKANSAS APPELLEE

PETITION FOR RE-HEARING BY LEE MODE APPELLANT HEREIN

Comes now Lee Mode, Appellant herein, and for his Motion for Re-hearing states:

1. The decision in the case was rendered on October 30, 1961.

2. The Court erred in its ruling that with few exceptions the assignments therein and the Motion for New Trial in this case are the same as those in the first appeal and that the Appellant is now precluded from urging as error any assignment in the Motion for New Trial in the present appeal if that assignment was contained in Motion for New Trial in the first appeal and in eliminating under the rule of "law of the case" all such assignments from consideration in the present appeal and in so doing has denied the Appellant herein due process of law guaranteed to him under the Constitution and law of the United States and the State of Arkansas.

3. The Court erred in holding that the State made such showing as to render admissible the former testimony of the witness, Jerry Russell, in this case, and furthermore that under the rule of "the law of the case" the Appellant was foreclosed from urging such assignment of error in this appeal and thus denied the Appellant of due process

guaranteed to him by the Constitution of the United States and the State of Arkansas, and the Court further erred in holding and ruling that objections to the content of the testimony of the witness, Jerry Russell, are foreclosed by the "rule of the law of the case" and thus denied the Appellant of the due process guaranteed by the Constitution and law of the United States and the State of Arkansas.

4. The Court erred in denying the Appellant's assignment of error on the introduction or admission of the testimony of the witness from Sallisaw, Oklahoma, as to association of the Appellant with Mrs. Mildred Russell subsequent to the homicide involved.

5. The Court erred in holding and ruling against the Appellant's assignment No. 43 relating to the admission of the testimony that the reputation of the deceased for peace and quietude was good over the objection and exception of the defendant, and in this connection in further finding, ruling and holding that the defendant below had opened the door to the introduction by the State of such testimony and thereby has denied the defendant of the due process guaranteed by the Constitution and law of the United States and the State of Arkansas.

WHEREFORE, the Appellant respectfully prays that the decision of this case be vacated and re-hearing on the merits of the case be granted.

HOLT, PARK & HOLT and
HARDIN, BARTON & HARDIN

ATTORNEYS FOR APPELLANT

PETITION FOR EXTENSION OF TIME TO FILE BRIEF ON THE FOREGOING PETITION

Counsel for Appellant respectfully petitions the Court for an extension of time in which to prepare and file printed brief on this petition and for cause say that it has been impossible for them to make such preparation and cause the same to be printed in time for filing within the 17 calendar days allowed by Rule 20. The brief will necessarily cover more than two typed pages of readable paper and therefore must be printed under the Rules, and the Petitioners respectfully pray.

HOLT, PARK & HOLT and
HARDIN, BARTON & HARDIN

CERTIFICATE OF SERVICE OF COUNSEL

I, G. C. Hardin, one of counsel for appellant, certify that there is merit in this petition and that the same is not filed for the purpose of delay and I further certify that a copy of said petition has been forwarded by U. S. mail to Hon. Frank Holt, Attorney General for the State of Arkansas at his office in the Justice Building, Little Rock, Arkansas, on this 13th day of November, 1961.

IN THE ARKANSAS SUPREME COURT

LEE MODE ..... APPELLANT

Vs. No. 5011

STATE OF ARKANSAS ..... APPELLEE

ENTRY OF CERTIFICATION

On motion of the appellant, Lee Mode, this Court certifies that in connection with a petition for re-hearing the appellant filed arguments by brief in this Court in which it was insisted and relied upon by said appellant that the refusal of this court to consider those assignments of error in the second appeal of this case which were also raised on the first appeal of this case, which was styled Lee Mode vs. State of Arkansas, No. 4955, was a denial of due process

on the part of this Court under the Fourteenth Amendment to the Constitution of the United States; and that it became material to determination of said petition for rehearing in this case for the Court to determine the question as to whether or not this Court had denied the appellant due process of law under the Fourteenth Amendment to the Constitution of the United States in denying said petition for re-hearing as appears in the entry and judgment of denial heretofore made herein.

IT IS HEREBY CERTIFIED that this Court is the highest court of law and equity in the State of Arkansas in which a decision of this case could be had.

This certification is so entered this 31st day of January, 1962.

CARLETON HARRIS

CARLETON HARRIS, Chief Justice
Supreme Court of the State of Arkansas

FILED: Jan. 31, 1962

PHILIP N. GOWEN, CLERK

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SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 761

LEE MODE ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

FRANK HOLT
Attorney General
State of Arkansas

THORP THOMAS
Assistant Attorney General
State of Arkansas

Counsel for Respondent

PARAGON PRINTING CO., LITTLE ROCK

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SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 761

LEE MOORE ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at Ark. ; 350 S.W. 2d 675.

JURISDICTION

The petitioner has failed to show that he properly raised the federal question. He must follow the state procedure in raising the question. The procedure in Arkansas requires that the constitutional question be raised in the trial court and if it is not the Court will not consider it for the first time on appeal. *Latham v. Hudson*, 226

Ark. 673; 292 S.W. 2d 252. Thus when required by state practice, the federal question must be raised before the trial court. And it must be presented to the trial court at the point considered appropriate under state procedure. See *Hulbert v. Chicago*, 202 U.S. 275 (complete failure to raise question at trial court level); *Brown v. Massachusetts*, 144 U.S. 573, 580 (Failure to raise question before verdict held to be fatal); *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 234-5 (proper to raise question in motion for new trial).

The petitioner here raised the federal question for the first time in a petition for rehearing (R.109). Raising the federal question for the first time in a petition for rehearing addressed to the highest state court is generally insufficient unless the court actually entertains the petition and expressly decides the question. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128; *Herndon v. Georgia*, 295 U.S. 441, 443; *American Surety Co. v. Baldwin*, 287 U.S. 156; *Forbes v. State Council*, 216 U.S. 396; *Zimmerman v. Nebraska*, 116 U.S. 54. To constitute a reviewable judgment under such circumstances, the order denying the petition for rehearing must be more than a cursory recitation that the petition has been fully or maturely considered and accordingly is denied. *Consolidated Turnpike Co. v. Norfolk & O.V. R. Co.*, 228 U.S. 326, 333-4; *Forbes v. State Council*, *supra*, 399; *McGirl dale v. Texas*, 211 U.S. 432, 436-7. It is submitted that the entry of certification (R.112) is not sufficient to raise the federal question.

QUESTION PRESENTED

Whether there was a denial of due process of law under the Fourteenth Amendment of the Federal Constitution by the refusal of the Supreme Court of Arkansas to consider on appeal assignments of error that were disposed of on the first appeal.

STATEMENT

The question presented here was raised for the first time on a petition for rehearing.

The petitioner was charged by information October 13, 1965, with the crime of first degree murder. His first trial was held March 24, 1966, with the jury returning a verdict of second degree murder and fixing his punishment at 21 years in the state penitentiary. On appeal the Supreme Court of Arkansas reversed because of an erroneous instruction. *Mosby v. State*, 231 Ark. 477, 330 S.W. 2d 88. The second trial of this cause was held October 24, 25, and 26, 1966. Again the petitioner was found guilty of second degree murder and his punishment fixed at 21 years in the penitentiary.

The facts are briefly as follows: On October 13, 1965, at about 10:30 a.m., the victim D. L. Russell was walking west on Vauroukle Street in Conway, Arkansas, when the petitioner suddenly stepped from the doorway of the Farmers Supply Store with a pistol in his hand. Russell grabbed the petitioner's right arm in an apparent attempt to push the gun away, slipped from the curb with the petitioner firing two shots at him. One of the shots struck Russell in the left ear and entered his brain, thereby causing his death.

The evidence was abundant that the petitioner was having an illicit affair with Russell's wife. The Russell children testified that Petitioner would come to their home, in their father's absence, and give them money to leave his and their mother's presence with the excuse of having them count the cattle or check the depth of the stock pond. Cecil Barnett, Russell's stepfather, while working at the Russell's residence, which was owned by petitioner, entered the house and saw Mrs. Russell in petitioner's presence wearing only pants and a brassiere. After the reversal of the case petitioner moved to Oklahoma with Russell's widow and held her out as his wife.

ARGUMENT

The petitioner's sole argument is that he was denied due process of law since the Supreme Court of Arkansas refused to consider on the second appeal assignments or error which were raised in the first appeal under the rule of the "Law of the Case".

It suffices to say that decisions by appellate courts becomes the law of the case on the second trial. *Marron v. U.S.*, 18 F 2d 218, certiorari granted 274 U.S. 727, affirmed 275 U.S. 192, motion denied 48 S. Ct. 206, 72 L. Ed. 1016.

Hence the petitioner's argument is devoid of merit.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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May 14, 1962